Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

ARMAND BONVICINO and DAVID BUELOW,

Petitioners,

v.

BRUCE HOPKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In affirming the District Court's denial of qualified immunity for police officers whose warrantless entry into a residence resulted in the arrest of the inhabitant for violating California Vehicle Code § 23152 (driving under the influence), the Ninth Circuit concluded that the California Supreme Court misinterpreted *Welsh v. Wisconsin*, 466 U.S. 740 (1984), which held that the Fourth Amendment prohibited police officers from making a warrantless entry to arrest an individual for a non-jailable DUI (driving under the influence) infraction under Wisconsin law. The Ninth Circuit rejected the officers' reliance on *People v. Thompson*, 38 Cal.4th 811, (2006), *cert denied*, 549 U.S. 980 (2006), which held that police officers may enter a residence without a warrant to arrest a person for a jailable DUI offense pursuant to the exigency exception.

The officers contend that their entry was objectively reasonable under either of two exceptions to the Fourth Amendment's warrant requirement: Exigent Circumstances and/or Emergency Doctrine.

The questions presented are:

1. Is driving under the influence of alcohol properly deemed to be such a "minor" offense that entry into a residence under the exigency exception to preserve evidence of that offense can never be justified – even though the offense carries a penalty of up to six months in jail and the commission of the offense results in thousands of deaths every year?

2. If a citizen eyewitness makes a report to the police that, on its face, provides a fair probability that a person has just committed a crime, are police required to conduct further investigation into that crime before they may enter the suspect's residence to prevent the imminent destruction of evidence of that crime?

3. In assessing the constitutionality of a warrantless entry into a residence by police to check on the condition of a person inside the residence, is a court prevented from placing any weight on the fact that the person inside has failed to answer the door because "nothing requires an individual to answer the door in response to a police officer's knocking"?

4. Does the pointing of a gun at an individual inside an unfamiliar residence prior to the apprehension of that individual for the commission of a crime constitute excessive force?

LIST OF PARTIES

Defendants/petitioners are former City of San Carlos ("City") Police Officers Armand Bonvicino ("Bonvicino") and David Buelow ("Buelow") (collectively, "petitioners").[1]

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[1] Defendant Police Officer Nick Nguyen was dismissed by the Ninth Circuit in its July 16, 2009 Opinion and is thus not a party to this petition. The City, which is also a named defendant, is not a party to this petition, which deals solely with the application of the qualified immunity doctrine to Officers Bonvicino and Buelow.

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OPINIONS BELOW

The July 16, 2009 opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Hopkins v. Bonvicino, et al.*, 573 F.3d 752 (9th Cir. 2009). *See* Appendix A. The Ninth Circuit affirmed in part and reversed in part the December 21, 2006 order of the United States District Court for the Northern District of California. *See* Appendix B for the District Court Order.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Court also has jurisdiction pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 525 – 527 (1985).

The judgment of the Ninth Circuit Court of Appeals was entered on July 16, 2009. The Ninth Circuit denied a timely petition for panel rehearing and rehearing *en banc* on September 14, 2009. *See* Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983 – Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution – Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Vehicle Code Section 23152[2]

California Vehicle Code Section 23536[3]

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[2] Due to the length of this code sections, pursuant to Supreme Court Rule 14(f), please see Appendix "D" for the text.

[3] Due to the length of this code sections, pursuant to Supreme Court Rule 14(f), please see Appendix "D" for the text.

California Vehicle Code Section 40300.5[4]

California Vehicle Code Section 20002[5]

STATEMENT OF THE CASE

This lawsuit arises out of the August 22, 2003 arrest of Bruce Hopkins at his residence by San Carlos police officers for violating California Vehicle Code §§ 20002 (hit and run) and 23152 (driving under the influence). Hopkins claims that the City and its police officers violated his Fourth Amendment rights by entering his residence and arresting him without a warrant and that the pointing of a gun at him constituted excessive force. Hopkins also asserts a *Monell* cause of action against the City for policies, which he claims tolerates illegal searches and seizures. The officers contend that their actions did not violate Hopkins' Fourth Amendment rights and that they are nonetheless entitled to qualified immunity. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

On August 22, 2003, the City's Police Department received a call from Wahida Talib ("Talib") who reported that she had been involved in an automobile accident with another vehicle that had fled the scene. (Excerpt of Record ("ER") Tab No. 6 at 2:23 – 3:5; ER Tab No. 8,

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[4] Due to the length of this code sections, pursuant to Supreme Court Rule 14(f), please see Appendix "D" for the text.

[5] Due to the length of this code sections, pursuant to Supreme Court Rule 14(f), please see Appendix "D" for the text.

¶ 3; ER Tab No. 9, ¶ 3; ER Tab No. 10, ¶¶ 3, 4; ER Tab No. 12, ¶ 3, Docket No. 19.) Talib followed the fleeing vehicle to 2330 San Carlos Avenue (hereinafter, "residence") and saw the driver, Hopkins, whom she believed had been drinking, go inside the residence at that address. (*Id.*) Officer Bonvicino was dispatched to the call as the primary officer with Officers Buelow and Nguyen responding as his cover officers.

Upon arriving at the scene, Bonvicino and Nguyen made contact with Talib, who was standing in front of the residence. Talib described the strange traffic accident to the officers. She told them that as she was waiting at a red light in the left turn lane, she saw Hopkins (whose vehicle was directly in *front* of hers in the left turn lane) move forward and rear-end the vehicle in front of him. Hopkins then reversed his vehicle, striking the front of Talib's car. After hitting two vehicles, Hopkins fled the scene. Talib, who was driving a rental car, followed Hopkins and saw him enter the residence. She called the police and then waited in front of the residence until the police arrived. (ER Tab No. 6 at 3:7 – 21; ER Tab No. 8, ¶¶ 4 – 6; ER Tab No. 9, ¶ 5; ER Tab No. 12, ¶¶ 5, 6, Docket No. 19.)

Talib told the officers that she suspected that Hopkins was under the influence of alcohol because when she spoke with him in front of the residence she smelled the strong odor of an alcoholic beverage coming from him. She also told the officers that Hopkins looked impaired and had difficulty walking. (ER Tab No. 6 at 3:16 – 21; ER Tab No. 8, ¶ 6; ER Tab No. 9, ¶ 5; ER Tab No. 12, ¶ 6, Docket No. 19.)

After speaking with Talib, Bonvicino went to the front door of the residence to contact Hopkins. He knocked loudly and announced himself as a City police officer through an open screen window at least four times without getting a response. After Officer Buelow arrived on scene, he and Bonvicino walked around the side of the house to try to contact Hopkins. (ER Tab No. 6 at 3:22 – 4:8, 4:16 – 4:21; ER Tab No. 8, ¶¶ 7 - 9; ER Tab No. 9, ¶¶ 4 - 7; ER Tab No. 12, ¶ 7; ER Tab No. 10, ¶¶ 3, 4; ER Tab No. 11, ¶¶ 3, 4, Docket No. 19.) At that point, not having received any response from inside the residence and knowing that there had been a traffic collision, Bonvicino and Buelow concluded Hopkins might need medical help. Based on their training and what they had learned from Talib about Hopkins' physical appearance, they also believed that Hopkins might be suffering from a diabetic emergency and thus be unable to communicate. From their first aid training, they understood that persons having a diabetic emergency display what appear to be signs of intoxication, restlessness and confusion, and a fruity odor on their breath that an untrained person (e.g., Talib) could mistakenly believe was the smell of alcohol. (ER Tab No. 6 at 4:5 – 4:15; ER Tab No. 8, ¶ 8; ER Tab No. 9, ¶ 6; Docket No. 19.)

Bonvicino and Buelow loudly announced through the side screen door that they would be making an entry into the house to check on Hopkins' welfare, but still did not get a response. Not wanting to leave the scene without confirming Hopkins' well-being, Buelow called dispatch, requested that fire and medics be sent to the scene and advised dispatch that they would be entering the residence to check on Hopkins' welfare. (ER Tab

No. 6 at 4:16 – 5:1; ER Tab No. 8, ¶ 9; ER Tab No. 9, ¶ 7; ER Tab No. 10, ¶¶ 3, 4; ER Tab No. 11, ¶¶ 3, 4; Docket No. 19.)

After making a small cut in the screen door/window, Bonvicino and Buelow opened the door and entered the residence. They entered the dark home with flashlights and guns drawn for officer safety and searched for Hopkins, eventually finding him lying on the floor of the dark garage next to a bed. (ER Tab No. 6 at 5:1 – 5; ER Tab No. 8, ¶ 10; ER Tab No. 9, ¶ 8; Docket No. 19.) They identified themselves as police officers.

While they entered the residence because they feared for the safety of Hopkins, they were also concerned for their own safety in such an unfamiliar environment. They commanded Hopkins to show his hands and get up off the floor if he was able. Hopkins slowly got up and eventually showed his hands. Bonvicino holstered his sidearm, approached Hopkins and, as he got closer, he could smell alcohol on Hopkins' breath and noticed that his speech was slurred. Hopkins staggered toward Bonvicino. His eyes were red and watery. (ER Tab No. 6 at 5:6 – 16; ER Tab No. 8, ¶¶ 10 - 11; ER Tab No. 9, ¶ 9; Docket No. 19.) Buelow kept his sidearm pointed at Hopkins while Bonvicino approached Hopkins and holstered his sidearm once he was handcuffed.

Bonvicino told Hopkins that they had entered because they feared that he might be having a diabetic emergency. Upon realizing that Hopkins was not having a diabetic emergency, but instead appeared to be under the influence of alcohol, the officers cancelled fire and

medics. (ER Tab No. 6 at 5:17 – 22; ER Tab No. 7, Exhibit "A" at 107:8-11, 108:1-21, 111:22-25; ER Tab No. 8, ¶ 11; ER Tab No. 9, ¶ 9; ER Tab No. 10, ¶¶ 3, 4; ER Tab No. 11, ¶¶ 3, 4; Docket No. 19.)

Because Hopkins had been involved in a traffic accident, had left the scene of the accident, and appeared to be intoxicated, Bonvicino handcuffed Hopkins without incident for officer safety and the officers brought Hopkins outside without incident. (ER Tab No. 6 at 5:22 – 6:3; ER Tab No. 8, ¶ 12; ER Tab No. 9, ¶¶ 9, 10; Docket No. 19.)

After Bonvicino and Buelow brought Hopkins outside the residence, Talib positively identified Hopkins as being the driver of the car that had struck her vehicle and fled the scene. Talib placed Hopkins under private persons arrest for violating California Vehicle Code § 20002(a) and Hopkins was taken into custody by Bonvicino. In addition to being taken into custody for hit and run, Hopkins was taken into custody for DUI (California Vehicle Code § 23152) based on Bonvicino's observations of him at the scene. (ER Tab No. 6 at 6:4 – 17; ER Tab No. 8, ¶ 13; ER Tab No. 9, ¶ 10; ER Tab No. 12, ¶¶ 8, 9; Docket No. 19.)

Bonvicino transported Hopkins to the police department, where he was subjected to a series of field sobriety tests. Based on his observations of Hopkins at the scene and at the Police Department, and the results of the field sobriety tests, Bonvicino placed Hopkins under arrest for violation of California Vehicle Code §23152 and transferred him to San Mateo County Jail. (ER Tab No. 6 at 7:4 - 9; ER Tab No. 8, ¶ 15; Docket No. 19.)

After arriving at San Mateo County Jail and being told that he would have to submit to a blood or breath test, Hopkins chose the breath test. He failed the breath test, blowing more than twice the legal limit as designated by California Vehicle Code § 23152(b). After failing the breath tests, Hopkins was booked into custody at the jail without incident. (ER Tab No. 6 at 7:10 - 15; ER Tab No. 8, ¶ 16; Docket No. 19.)

Hopkins filed his complaint in the Northern District of California on July 19, 2005, naming the City and the three responding police officers as defendants. He alleges that the City and the officers violated his civil rights pursuant to 42 U.S.C. § 1983. On September 20, 2006, the City, Bonvicino, Buelow, and Nguyen filed a motion for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56 (the "Motion"). In the Motion, the officers argued that the warrantless entry was objectively reasonable under either of two alternative exceptions to the Fourth Amendment warrant requirement – the Emergency Doctrine and Exigent Circumstances – and that the officers were nevertheless entitled to qualified immunity. The District Court entered its Order on December 21, 2006, granting the Motion in part and denying it in part. *See* Appendix B. As pertinent here, the Court denied Bonvicino and Buelow's motion for qualified immunity on Hopkins' Fourth Amendment and excessive force claims.

Petitioners filed their Notice of Appeal on January 16, 2007. The Ninth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 1292(a), and pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 525 – 27 (1985). The Ninth Circuit's decision was entered on July

16, 2009. Petitioners timely filed their Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on August 20, 2009. On September 14, 2009, the Ninth Circuit denied the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc*. *See* Appendix C.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S OPINION IS INCONSISTENT WITH *WELSH v. WISCONSIN* AND CONFLICTS WITH OTHER CIRCUIT AND STATE HIGH COURTS' DECISIONS REGARDING THE APPLICATION OF THE EXIGENCY EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT

The judgment of the United States Court of Appeal for the Ninth Circuit should be reviewed by this Court because: (i) it involves an issue of national importance (whether a police officer may enter a residence without a warrant to make an arrest for a jailable offense pursuant to the exigency exception to the Fourth Amendment's warrant requirement); and (ii) it is clearly inconsistent with *Welsh v. Wisconsin*, 466 U.S. 740 (1984), which has been interpreted and applied by numerous jurisdictions throughout the United States, including this Court[6], as being limited to "non-jailable" offenses. As set forth in detail in *People v. Thompson*, 38 Cal. 4th 811, despite this Court's decision in *Illinois*

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[6] In issuing its judgment here, the Ninth Circuit ignored *Illinois v. McArthur*, 531 U.S. 326, 336 (2001), in which this Court limited the *Welsh* opinion to "nonjailable" offenses.

v. McArthur, 531 U.S. 326, there remains a split amongst state high courts and the circuit courts over the interpretation and application of *Welsh*. Without clarification from this Court, jurisdictions such as the Ninth Circuit will continue to misinterpret and misapply *Welsh* to the legal detriment of law enforcement officers.

The majority view on the application of *Welsh* to warrantless entries is set forth in *People v. Thompson*, 38 Cal. 4th 811. In *Thompson*, the California Supreme Court interpreted and applied *Welsh* so as to provide California law enforcement officers with the constitutional authority to enter a residence without a warrant to arrest an individual for a jailable DUI offense pursuant to the exigency exception. The California Supreme Court recognized that the body's metabolization of alcohol qualified as the imminent destruction of evidence justifying a warrantless entry and held that the police may enter a home without a warrant to effect an arrest of a DUI suspect. *People v. Thompson*, 38 Cal. 4th at 827. The *Thompson* Court considered the People's concerns about the imminent destruction of evidence "well founded." *Id.* at 825. These concerns were: (1) "defendant's blood-alcohol level would have diminished while the police sought a warrant as the body metabolized the alcohol, and (2) that defendant could have masked his blood-alcohol level while the police sought a warrant by ingesting more alcohol." *Id.*

Unbeknownst to petitioners at the time they entered the residence, but later admitted by Hopkins in deposition, Hopkins began the very process of masking his blood-alcohol level by drinking more alcohol immediately upon his arrival home. Within the 25

minutes that passed between his arrival home and the officers' entry, he drank "four to five" beers "at least." (ER Tab No. 7, Exhibit "A" at 94:20 – 95:16; Docket No. 19.)

The California Supreme Court distinguished the *Welsh* case, stating that in *Welsh* the "high court invalidated the arrest because 'an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.'" *Thompson*, 38 Cal. 4th at 821, *quoting Welsh*, 466 U.S. at 753. Wisconsin classified a first offense for DUI as a noncriminal, civil forfeiture offense for which no imprisonment is possible. *Thompson*, 38 Cal. 4th at 821, *referencing Welsh*, 466 U.S. at 754. The issue in *Welsh* was thus whether "the Fourth Amendment prohibits the police from making a warrantless night entry of a person's home in order to arrest him for a *nonjailable* offense." *Thompson*, 38 Cal. 4th at 821 (*emphasis* in original), *quoting Welsh*, 466 U.S. at 742.

Unlike Wisconsin, California "classifies a first offense for driving under the influence as a *criminal* act that is punishable by no more than six months and no less than 96 hours in jail" and, as such, "the possibility of imprisonment distinguishes DUI in California from DUI in Wisconsin." *Thompson*, 38 Cal. 4th at 821[7],

[7] The *Thompson* Court made note of the legislative intent behind permitting warrantless arrests for a jailable DUI offense in California –

> "[w]hen the Legislature amended *Vehicle Code section 40300.5* to allow warrantless arrests for this

(Cont'd)

referencing California Vehicle Code § 23536(a). The California Supreme Court construed the scope of the *Welsh* holding, limiting it to "Wisconsin's 'amazing' decision to classify DUI as a nonjailable offense (citations omitted) and not as a categorical bar on warrantless arrests for DUI in the vast majority of states that, like California, classify it as a crime with the possibility of imprisonment." *Id.* at 821.

Numerous other jurisdictions throughout the United States have interpreted and applied *Welsh* in the same fashion as the California Supreme Court in *Thompson*. *See e.g.*, *Mendez v. People*, 986 P.2d 275, 283 (Colo. 1999); *Dolan v. Salinas*, 1999 Conn. Super. Lexis 1988, *13 (Conn.Super.Ct. 1999); *Dyer v. State*, 680 So. 2d 612, 613 (Fla.Dist.Ct.App. 1996); *Threatt v. State*, 240 Ga. App. 592 [524 S.E.2d 276, 280] (1999); *People v. Lagle*, 200 Ill. App. 3d 948 [146 Ill. Dec. 551, 558 N.E.2d 514, 519] (1990); *State v. Legg*, 633 N.W.2d 763, 773 (Iowa 2001); *State v. Paul*, 548 N.W.2d 260, 267 (Minn. 1996); *City of Kirksville v. Guffey*, 740 S.W.2d 227, 229 (Mo.Ct.App. 1987); *State v. Ellinger*, 223 Mont. 349 [725 P.2d 1201, 1204] (1986); *State v. Nikola*, 359 N.J. Super. 573 [821 A.2d 110, 118] (2003); *People v. Odenweller*, 137 A.D.2d 15 [527 N.Y.S.2d 127, 129] (App.Div. 1988); *Beachwood*

(Cont'd)

> misdemeanor offense not committed in the presence of the officer, it found and declared that driving while under the influence of alcohol or drugs continues to pose a substantial danger to public health and safety, injuring over 65,000 people per year and killing an additional 2,400."

38 Cal. 4th at 821.

v. Sims, 98 Ohio App. 3d 9 [647 N.E.2d 821, 825] (1994); *State v. Roberts*, 75 Ore. App. 292 [706 P.2d 564, 566] (1985); *Beaver v. State*, 106 S.W.3d 243, 248 (Tex.Crim.App. 2003); *City of Orem v. Henrie*, 868 P.2d 1384, 1392 (Utah Ct.App. 1994); *Cherry v. Com.*, 44 Va. App. 347 [605 S.E.2d 297, 307] (2004); *State v. Griffith*, 61 Wn. App. 35 [808 P.2d 1171, 1176 & fn. 7] (1991); *Goines v. James*, 189 W. Va. 634 [433 S.E.2d 572, 577-578] (1993); *State v. Hughes*, 2000 WI 24 [607 N.W.2d 621, 631] (2000); *Rideout v. State*, 2005 WY 141 [122 P.3d 201, 210] (2005); *Joyce v. Town of Tewksbury, Mass.*, 112 F.3d 19, 22 (1st Cir. 1997).

In rejecting *Thompson*, the Ninth Circuit aligned itself with the minority of jurisdictions that have extended *Welsh* to misdemeanors carrying the possibility of imprisonment. *See e.g.*, *Patzner v. Burkett*, 779 F.2d 1363 (8th Cir. 1985); *State v. Flegel*, 485 N.W.2d 210 (S.D. 1992); *Norris v. State*, 338 Ark. 397 [993 S.W.2d 918] (1999). Despite the clear language of *Welsh* and *McArthur*, the Ninth Circuit erroneously concluded that this Court "did *not* limit its holding in *Welsh* to nonjailable offenses. . . ." *See* Appendix A at p. 23a.

It is clear that the Ninth Circuit's Opinion conflicts with *Welsh* and that the California Supreme Court correctly applied *Welsh*. Further, it is apparent that jurisdictions throughout the country have a difference of opinion over the impact and application of the *Welsh* decision. This disagreement involves an issue that arises on a daily basis for police officers throughout the United States. Without clarification from this Court, law enforcement officers, such as petitioners, will be forced to either ignore *Thompson* (or other similar opinions

from other state high courts) or follow *Thompson* and face potential civil liability under §1983.

Petitioners believe that they are entitled to qualified immunity because reasonable officers in the same or similar situation would have believed that they were justified in entering Hopkins' residence without a warrant because there was probable cause to arrest for DUI and there were exigent circumstances.

Petitioners arrested Hopkins for violating California Vehicle Code § 23152, which states, in pertinent part:

> (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.
>
> (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. . . .

The California Vehicle Code provides police officers with the authority to arrest a person without a warrant and for actions not committed in their presence when:

> the officer has reasonable cause to believe that person has been driving while under influence of alcoholic beverage . . . when any of following exists: (a) The person is involved in traffic accident; . . . (c) The person will not be apprehended unless immediately arrested; (d) The person may cause injury to himself

> . . . or damage property unless immediately arrested; (e) The person may destroy or conceal evidence of the crime unless immediately arrested.

Cal. Veh. Code § 40300.5.

California Vehicle Code § 40300.5 created an exception to California Penal Code § 836, which requires that a misdemeanor be committed in the officers' presence for an arrest without a warrant.

California classifies a first offense for driving under the influence as a *criminal* act that is punishable by imprisonment in the county jail for not less than 96 hours and by a fine of not less than $390. *See* Cal. Veh. Code § 23536(a).

While *Thompson* was decided after the filing of the complaint in this case, it is nevertheless critical to the qualified immunity analysis and demonstrates that petitioners' warrantless entry into the residence was not clearly prohibited at the time it occurred. In that case, the California Supreme Court interpreted *Welsh* as not unilaterally prohibiting such entries in California. This Court's analysis of *Welsh* in *Illinois v. McArthur*, 531 U.S. 326, 336, also supports this view.

This Court did, in fact, look to the classification of the offense at issue in *Welsh* in conducting its exigency analysis – specifically, Wisconsin's interest in precipitating an arrest for DUI. 466 U.S. at 754. In *Welsh*, this Court recognized that "Wisconsin has chosen to classify the first offense for driving while

intoxicated as a noncriminal, civil forfeiture offense *for which no imprisonment is possible." Id.* (*emphasis* added). This Court noted that:

> This is the best indication of the [Wisconsin's] interest in precipitating an arrest, and is one that can be easily identified both by the court and by officers faced with a decision to arrest. . . . Given this expression of [Wisconsin's] interest, a warrantless homes arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.

Id.

This Court concluded its analysis of the Wisconsin DUI law by stating the following:

> Nor do we mean to suggest that the prevention of drunken driving is not properly of major concern to the States. The State of Wisconsin, however, along with several other States . . . has chosen to limit severely the penalties that may be imposed after a first conviction for driving while intoxicated. Given that the classification of state crimes differs widely among the Sates, **the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.**

Id. at 754, fn 14 (*emphasis* added).

Contrary to what is espoused by the Ninth Circuit, this Court clearly looked at the penalty associated with the underlying offense in conducting its exigency analysis. This Court made much of the fact that Wisconsin imposed a very limited penalty for DUI, characterizing it as a minor offense. Conversely, California, expressed its interest to penalize individuals for DUI by imposing a much more stringent penalty – imprisonment, which cannot reasonably be considered a "relatively minor" penalty or offense, like the one in Wisconsin for first time offenders[8]. *Welsh* therefore is distinguishable on its facts and did not prohibit petitioners from entering the residence without a warrant to arrest for DUI where there is probable cause.

The Ninth Circuit's Opinion is clearly inconsistent with *Welsh* and conflicts with other circuit and state high courts. If left to stand, the Ninth Circuit's Opinion would negatively impact the states' ability to enforce strong DUI laws and thus subject law-abiding motorists and pedestrians to further danger from drunk drivers who, based on the Ninth Circuit's Opinion, are now permitted to rush home to destroy evidence of their crime.

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[8] In footnote 10 of its Opinion, the Ninth Circuit notes that *Welsh* was ultimately charged with a jailable offense, but acknowledges that the officers did not know this at the time they entered his home. *See* Appendix A at p.23a. This point was relevant to the inquiry as to whether there were exigent circumstances in *Welsh*. It is, however, relevant to the inquiry in the instant case because it was clear that petitioners *were* aware that California law made DUI a jailable offense at the time of their entry. In point of fact, in California a multiple DUI offender (as was Hopkins) is guilty of a felony pursuant to California Penal Code § 17(a) and Vehicle Code § 23550(a).

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUIT AND STATE HIGH COURTS AS TO WHETHER POLICE OFFICERS MAY RELY SOLELY ON A STATEMENT PROVIDED BY A WITNESS OR CRIME VICTIM TO ESTABLISH PROBABLE CAUSE TO ARREST

There is a conflict between the Ninth Circuit and other circuit and state high courts as to whether a police officer may establish probable cause to arrest based solely on statements obtained from a witness to, or victim of, a crime. The majority view is that when the information about a crime comes from someone who claims to have either witnessed or been a victim of the crime (like Talib here), the information carries with it the indicia of reliability and is presumed to be reliable, even without specific corroboration of the reliability, for purposes of establishing probable cause. Most courts have concluded that such corroboration is unnecessary when the reports of one who appears to be an average citizen are made upon personal observation of the commission of a crime. *See, e.g., U.S. v. McKinney*, 328 F.3d 993 (8th Cir. 2003); *U.S. v. Blount*, 123 F.3d 831 (5th Cir. 1997); *U.S. v. Decoteau*, 932 F.2d 1205 (7th Cir. 1991); *People v. Hubbard*, 184 Colo. 225, 519 P.2d 591 (1974); *State v. Sivri*, 231 Conn. 115, 646 A.2d 169 (1994); *Hooks v. State*, 416 A.2d 189 (Del. 1980); *State v. Drake*, 224 N.W.2d 476 (Iowa 1974); *State v. Harris*, 589 N.W.2d 782 (Minn. 1999); *State v. Baker*, 103 S.W.3d 711 (Mo. 2003); *People v. Ramey*, 16 Cal. 3d 263, 269 (1976).

The Ninth Circuit has rejected this prevailing view, holding that "in establishing probable cause, officers may not rely solely on the claim of a citizen witness that [s]he was a victim of the crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses." Appendix A at p. 20a, *quoting Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, 925 (9th Cir. 2000). This conflict has very real implications to police officers on the street, who are charged with enforcing laws and are often faced with exigent circumstances. Petitioners respectfully request that this Court clarify whether a police officer may rely on the statement of a witness to or a victim of a crime to establish probable cause to arrest for the crime.

In conjunction with petitioners' motion for qualified immunity based on the exigency exception, the Ninth Circuit concluded that petitioners did not have probable cause to arrest Hopkins for DUI before they entered his residence because they entered the home "based solely on the information they obtained from Talib – namely, that she had been involved in an extremely minor car accident with Hopkins, that she smelled alcohol on his breath, and that he appeared intoxicated." Appendix A at p. 20a. While the Ninth Circuit's statement inexplicably ignores the more-detailed information that Talib provided to petitioners[9],

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[9] The Ninth Circuit ignored the following undisputed facts in its discussion of probable cause: (i) Talib witnessed Hopkins drive erratically (e.g., striking two vehicles in a left turn lane); (ii) Hopkins fled the scene of the accidents and drove to the (Cont'd)

petitioners contend that they should have been able to rely on all of the information provided by Talib (a purported victim of a crime) to establish the requisite probable cause to arrest Hopkins.

While the crime was not committed in petitioners' presence, the California Vehicle Code and the detailed information provided by Talib provided petitioners would have caused a reasonable officer to believe that a crime had been committed and that Hopkins was the perpetrator. California Vehicle Code § 40300.5 permits officers in California to arrest a person without a warrant and for actions not committed in their presence "when the officer has reasonable cause to believe that person has been driving while under influence of alcoholic beverage" and if *any* of the following circumstances are present: "(a) The person is involved in a traffic accident; . . . (c) The person will not be apprehended unless immediately arrested; (d) The person may cause injury to himself . . . or damage property unless immediately arrested; [or] (e) The person may destroy or conceal evidence of the crime unless immediately arrested." Cal. Veh. Code §40300.5.

Here, based on the detailed description provided by Talib of the incident, the condition of Hopkins, and the fact that Hopkins was inside the residence and not responding to petitioners' attempts to communicate with

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(Cont'd)

residence; (iii) Hopkins smelled of alcohol; (iv) Hopkins had difficulty walking; (v) Talib saw Hopkins go inside the residence; and (vi) Hopkins ignored Talib's attempts to speak with him.

him (and was thus concealing evidence of the crime), the elements of California Vehicle Code § 40300.5 were met, thus providing petitioners with the authority to arrest Hopkins before entering the residence.

Even applying the Ninth Circuit's prior decisions to this case, this is clearly a situation where the reporting party "furnish[es] underlying facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect as the perpetrator." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1990), *quoting People v. Ramey*, 16 Cal.3d 263, 269 (1976). Neither a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities. *People v. Ramey*, 16 Cal. 3d at 269.

Unlike the informant in *Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912 (9th Cir. 2000), the case cited by the Ninth Circuit in its Opinion, Talib provided sufficiently detailed facts regarding the incident and thus her allegations alone sufficed to establish probable cause for the arrest. *See Peng v. Penghu*, 335 F.3d 970, 976 (9th Cir. 2003) (*quotation* omitted). In *Peng*, the Ninth Circuit concluded that because the alleged victim provided sufficiently detailed facts regarding the incident, her allegations alone sufficed to establish probable cause for the arrest. *Id.* at 978.

Talib placed Hopkins in the car that had collided with her car and another vehicle, described Hopkins' erratic driving[10] and his physical disposition, and then placed Hopkins inside the residence.

Reasonable officers would have reasonably concluded that petitioners had probable cause to arrest Hopkins because "under the totality of the circumstances known to the arresting officer[s], a prudent person could have concluded that there was a fair probability that [Hopkins] had committed a crime [violation of California Vehicle Code section 23152]." *John v. City of El Monte*, 515 F.3d 936, 941 (9th Cir. 2008).

This probable cause, coupled with the exigent circumstances discussed *infra*, justified the warrantless entry into the residence and arrest of Hopkins.

III. REVIEW IS ALSO WARRANTED UNDER THE SUPERVISORY POWERS OF THE COURT BECAUSE THE UNDISPUTED FACTS AND THE CLEARLY ESTABLISHED LAW SUPPORT PETITIONERS' CLAIM OF QUALIFIED IMMUNITY PURSUANT TO THE EMERGENCY AID EXCEPTION.

The emergency aid exception to the Fourth Amendment warrant requirement provides independent legal justification for petitioners' warrantless entry. The Ninth Circuit erred as a matter of law because the

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[10] Hopkins struck two cars and left the scene of both accidents.

totality of the circumstances and clearly established case law provided petitioners with an objectively reasonable basis for concluding that Hopkins was seriously injured or imminently threatened with injury such that their entry would not violate Hopkins' Fourth Amendment rights.

In rejecting petitioners' emergency aid argument, the Ninth Circuit relied, in part, on the fact that "nothing requires an individual to answer the door in response to a police officer's knocking." Appendix A at p. 16a. While an individual may not be required to come to the door or open the door for an officer, petitioners claim that Hopkins' failure to respond to their repeated knocks and calls into open windows of the residence should be part of the "totality of the circumstances" analysis that must be performed in determining the applicability of the emergency aid exception. (E.g., Does the failure to respond make it reasonable for an officer to be concerned that the individual inside may not be able to respond because of a medical emergency?) Because petitioners did not make telephone calls into the residence (even though Hopkins is not required to answer the telephone), the Ninth Circuit concluded that Hopkins' failure to respond to other attempts at contact should not be part of the analysis (because he is not required to answer the door). Petitioners contend that the failure to respond should be considered as part of the emergency aid analysis and seek guidance and clarification from this Court on this important Fourth Amendment issue.

This Court has recognized that because the Fourth Amendment's "ultimate touchstone is 'reasonableness',

the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). For example, this Court has held that law enforcement officers may make a warrantless entry onto private property to "assist persons who are seriously injured or threatened with such injury" and "to prevent the imminent destruction of evidence." *Id.* at 403 (citations omitted). The exigencies of such situations "make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Id.*, *quoting Mincey v. Arizona*, 437 U.S. 385, 393 – 94 (1978).

The Ninth Circuit found justification for adopting the emergency doctrine under the police officers' "community caretaking function to respond to emergency situations." *U.S. v. Cervantes*, 219 F.3d 882, 889 (9th Cir. 2000). In *Brigham City*, this Court held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action." 547 U.S. at 404, *quoting Scott v. United States*, 436 U.S. 128, 138 (1978). Here, as in *Brigham City*, it "does not matter . . . whether the officers entered . . . to arrest [plaintiff] and gather evidence against [him] or to assist the injured. . . ." 547 U.S. at 405.

The Ninth Circuit's description of what the petitioners knew before entering the residence omits important and undisputed material facts that were part of the record and which independently support their entry under the emergency doctrine. Specifically, in conducting its analysis, the Ninth Circuit ignored Talib's

description of Hopkins' bizarre driving (striking two separate vehicles), the difficulty Hopkins had walking once he exited his vehicle and entered the residence, petitioners' multiple unsuccessful attempts to make contact with Hopkins inside the residence, and the fact that fire and paramedics were called *before* entry was made. The officers' claimed failure to ask Talib whether she had observed Hopkins wearing a medical alert bracelet or whether the odor on his breath was different from the smell of alcohol does not make their conclusion unreasonable based on the totality of what they knew. The Ninth Circuit's mention of these purported failures presumes that all diabetics wear such bracelets and that Talib, who had not expressed any expertise on the subject to the officers, would change her opinion of what the odor smelled like.

Referencing *Graham v. Connor*, 490 U.S. 386, 297 (1989), the Ninth Circuit had previously cautioned against second-guessing police officers, who "are often forced to make split-second judgments – in circumstance that are tense, uncertain, and rapidly evolving." *United States v. Russell*, 436 F.3d 1086, 1091 (9th Cir. 2006). The Ninth Circuit's Opinion in this case, involves the very same second-guessing that has been criticized by the Ninth Circuit.

The circumstances are not viewed from the standpoint of the plaintiff, but must be evaluated objectively from the officers' point of view. *United States v. Arellano-Ochoa*, 461 F.3d 1142, 1144 – 45 (9th Cir. 2006). It is easy now, nearly 6 years later and with the benefit of knowing plaintiff's actual condition inside the residence, to suggest that the officers could have done

things differently. However, that is not the test to determine if the officers' actions were reasonable. *See United States v. Russell*, 436 F.3d at 1091 – 92. (There is no requirement that the police obtain independent verification or other information relating to the emergency before entering a residence. The police must only have objectively reasonable grounds to believe that there is an emergency and that there is an immediate need for their assistance.)

Petitioners were presented with facts, which indicated that Hopkins had been involved in an automobile accident and was exhibiting symptoms that were consistent with either alcohol intoxication or a diabetic emergency, but was not responding to their inquiries into his well-being. Without being able to establish visual or verbal contact with plaintiff, there was no way for the officers to rule out either possibility. Not knowing what plaintiff's condition was because of his failure to respond to the officers' attempts to establish contact with him, it was reasonable to conclude that time was of the essence to insure that Hopkins was safe. After Hopkins failed to respond to Bonvicino's repeated requests that he communicate with them so that they could confirm his welfare, petitioners called for medics and entered the residence.

Hopkins' actions presented the petitioners with a Hobson's Choice – they could either (a) abandon their attempts to confirm Hopkins' welfare and face the prospect of being civilly and morally liable if plaintiff indeed was unable to respond because he was suffering from a medical emergency, or (b) enter the residence and discover that there is no medical emergency and

face the prospect of being named defendants in a civil lawsuit. As the Ninth Circuit has previously stated, this is the type of case where the police would be harshly criticized had they not investigated and plaintiff had actually been suffering from a medical emergency. *See United States v. Black*, 482 F.3d 1035, 1040 (9th Cir. 2006). "Erring on the side of caution is exactly what we expect of conscientious police officers [and] . . . [w]e should not second-guess the officers' objectively reasonable decision in such a case." *Id.* Rescue being the objective here, the officers erred on the side of caution and are now facing the unfortunate ramifications of that decision.

The officers had reasonable grounds to believe that there was an emergency at hand and an immediate need for their assistance for the protection of life. *Martin v. OF Oceanside*, 360 F.3d 1078, 1081 - 82, *citing U.S. v. Cervantes*, 219 F.3d at 888 – 90. The circumstances facing petitioners were not much different from those facing the officers in *U.S. v. Snipe*, 515 F.3d 947 (9th Cir. 2008). In *Snipe*, the Ninth Circuit concluded that the officers had an objectively reasonable basis for believing there was an immediate need to protect persons in a residence from serious harm based on the following circumstances: (i) the receipt of an anonymous call at approximately 5:00 a.m. from a "very hysterical sounding" male at approximately 5:00 a.m. screaming something to the effect of "[g]et the cops here now" or "[g]et the cops now" to a residence; (ii) upon arriving in response to the call, one of the officers, who was familiar with the residence, did not recognize a vehicle that was parked in front of it, nor did he recognize a person who was seen walking into the residence; and (iii) unlike other homes in the area, the residence's lights were on. 515 F.3d 949.

The Ninth Circuit rejected Snipe's argument that the officers should have done something to verify the caller's identity or the facts at Snipe's home before entering the residence because of the possibility of prank calls. *Id.* at 953 – 54. The Ninth Circuit responded by stating that it has "previously rejected such a requirement on the grounds that it 'would dramatically slow emergency response time, and would therefore be at odds with the purpose of the emergency doctrine – allow[ing] police to respond to emergency situations'" in a timely manner. *Id.* at 952, *quoting United States v. Russell*, 436 F.3d 1086 (9th Cir. 2006.) The Ninth Circuit went on to conclude that "[t]he possibility that immediate police action will prevent injury or death outweighs the inconvenience we suffer when the police interrupt out ordinary routines in response to what turns out to be a non-emergency call." *Snipe*, 515 F.3d at 954.

Here, the manner in which Bonvicino and Buelow entered the residence was also reasonable given the circumstances. Bonvicino initially went to the front door of the residence, knocked loudly and announced himself through an open screen window numerous times. Plaintiff did not respond. Bonvicino and Buelow then walked around the side of the house and found an open door with a locked screen door or window in front of it. They made additional calls in to the residence without success. At that point, not having received any response from inside the residence and knowing that there had been a traffic collision, the officers concluded that Hopkins might need medical aid. Bonvicino used his knife to make a small cut in the screen in order to each inside and open the door from the inside. After entering

the residence, the officers did no more than search the areas where plaintiff could potentially be located.

While the Ninth Circuit took issue with the officers' decision to arrest Hopkins once they concluded that he was not suffering from a diabetic coma, the Ninth Circuit has held that if, in responding to an emergency, officers "discover evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be found." *Snipe*, 515 F.3d at 952. This case is no different. Here, while they had probable cause to arrest Hopkins based on the information provided by Talib, upon seeing and smelling Hopkins for themselves, petitioners had an independent and reasonable basis for concluding that he was drunk and had been driving under the influence in violation of California Vehicle Code § 23152. They had probable cause to arrest him.

IV. REVIEW IS ALSO WARRANTED UNDER THE SUPERVISORY POWERS OF THE COURT BECAUSE THE UNDISPUTED FACTS AND THE CLEARLY ESTABLISHED LAW SUPPORT A FINDING OF QUALIFIED IMMUNITY ON THE EXCESSIVE FORCE CAUSE OF ACTION.

Pursuant to *Graham v. Connor*, 490 U.S. 386, 394 – 95 (1989), and *Los Angeles County v. Rettele*, 550 U.S. 609 (2007), petitioners are entitled to qualified immunity on Hopkins' excessive force cause of action. The Ninth Circuit erred in concluding that *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002), operated to defeat the officers' motion for qualified immunity on the excessive force cause of action.

Claims for excessive force by a peace officer during an arrest are analyzed under the Fourth Amendment of the United States Constitution. *Graham*, 490 U.S. at 394 – 95. The test is an objective one – whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent and motivation and without the "20/20 vision of hindsight." *Id.* at 396 – 97. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.*

Hopkins' claim arises from the fact that Buelow pointed his handgun at him in his dark bedroom, prior to being handcuffed by Bonvicino – the primary officer on the call. Hopkins makes much of the fact that Bonvicino holstered his sidearm after making contact with plaintiff because *he* did not perceive a "lethal threat" upon making contact with Hopkins. While Bonvicino believed that it would have been inappropriate for *him* to have pointed his weapon at plaintiff given his perception of the situation, at no time did he testify that it would have been inappropriate for Buelow, his cover officer, in advance of his safety, to do so up and until the point Hopkins was handcuffed.

The Ninth Circuit's ruling is inconsistent with this Court's holding in *Los Angeles County v. Rettele*, 550 U.S. 609. In *Rettele*, the sheriff's department executed a search warrant to locate four African Americans who were wanted for fraud and identify theft. *Id.* at 610.

In conjunction with the warrant, seven deputies entered a residence and proceeded to the bedroom with guns drawn. Once there, they ordered two Caucasian adults, who were not dressed, out of bed to show their hands and then proceeded to hold them at gunpoint for one or two minutes before Rettele was allowed to get dressed and get a bathrobe for his girlfriend. *Id.* at 611. After realizing that the people identified in the warrant no longer lived in the residence, the deputies apologized and left within five minutes. *Id.*

This Court ruled that no constitutional rights were violated and found that "[t]he orders by the police to the occupants, in the context of this lawful search, were permissible, and perhaps necessary, to protect the safety of the deputies." *Id.* As part of its reasoning, this Court also explained, "Blankets and bedding can conceal a weapon, and one of the suspects was known to own a firearm, factors which underscore this point. The Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach. The reports are replete with accounts of suspects sleeping close to weapons." *Id.*

Similarly, in this case, petitioners were conducting a lawful search. They found Hopkins lying on the floor next to a bed, which could have concealed a weapon. It was not unreasonable for the officers to hold Hopkins at gunpoint until he was secured in handcuffs to prevent him from reaching for a weapon. The search and detention was no more invasive than in *Rettele*, where the occupants (who were not named in the warrant) were forced to stand naked and outmanned at gunpoint.

Aside from the fact that weapons were drawn, the undisputed facts of this case are clearly distinguishable from the facts of *Robinson v. Solano County*, 278 F.3d 1007, which the Ninth Circuit relied upon in affirming the District Court's denial of petitioners' qualified immunity claim. In *Robinson*, the Ninth Circuit considered that "the suspect was apparently unarmed and approaching the officers in a peaceful way. There were no dangerous or exigent circumstances apparent at the time of the detention, and the officers outnumbered the plaintiff." *Id.* at 1014. In ruling on Hopkins' appeal, the Ninth Circuit erroneously found the circumstances be "indistinguishable" from *Robinson*. *See* Appendix A at p. 41a. The Ninth Circuit ignored the factors that make this case clearly distinguishable from *Robinson*.

In *Robinson*, officers approached the plaintiff, who was wearing an unbuttoned shirt and jeans, on the street, 135 feet from his front door, when they pointed they pointed their guns at his head. 278 F.3d at 1010. Here, petitioners made initial contact with Hopkins inside an unfamiliar and potentially dangerous setting – a residence that Hopkins described as being dark. Not only was it reasonable for Buelow to be concerned for his safety given the unfamiliar setting and individual, it was reasonable for him, as the cover officer, to draw his gun until Hopkins had been successfully handcuffed by Bonvicino to ensure the safety of everyone inside that room. The fact that Buelow holstered his weapon as soon as Hopkins was handcuffed and secured shows clearly that the weapon was drawn merely for protection and not for intimidation. Also, while Robinson voluntarily approached the officers and introduced himself, Hopkins

was unresponsive to the officers' attempts to communicate with him from outside the house.

Even if there were less intrusive options available to the officers to detain a person, police officers "need not avail themselves of the least intrusive means of responding to an exigent situation." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). Their conduct needs only be "within that range of conduct identified as reasonable." *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). "The question is not how much force was actually needed, but how much force a reasonable officer would perceive needing." *Saucier v. Katz*, 553 U.S. 194, 205 (2001).

If allowed to stand, the Ninth Circuit's ruling creates confusion as to when a police officer may draw their sidearm. Officers attempting to enforce the law and protect the public cannot do so effectively without knowing whether their actions are constitutional. "The risk of harm to both the police and [others] is minimized if the officers routinely exercise unquestioned command of the situation." *Michigan v. Summers*, 452 U.S. 692, 703 (1981). An officer should not be afraid to draw his weapon to protect himself, his fellow officers, or others around him. The Fifth Circuit recognized this and drew a distinction between "the use of force (e.g., firing a gun) and the display of force employed as a conditional threat to use actual force *if necessary*." *Hinojosa v. Terrell*, 834 F.2d 1223, 1231 (5th Cir. Tex. 1988) (abrogated on other grounds by *Lockett v. New Orleans City*, 639 F. Supp. 2d 710 (E.D. La. 2009) ("significant injury" and "malice" no longer necessary elements for excessive force); *see also Hudson v. McMillian*, 503 U.S. 1, 4 (1992).

The Sixth Circuit agreed with the reasoning behind the Fifth Circuit's decision. "By giving [an officer] the ability to pull out and point a service revolver at someone without risking tort liability, he may be able to abort a potentially violent situation. Conversely, to subject such displays of force to second guessing by a jury may increase the likelihood that the officer will wait until the situation escalates further before drawing his gun, and thereby end up having to (or believing he has to) shoot to protect himself or others." *Collins v. Nagle*, 892 F.2d 489 (6th Cir. 1989). In dicta, the Seventh Circuit court noted that "[w]here the officer merely points a gun at a suspect in the course of arresting him, the suspect would have no basis for claiming that he had been seized with excessive force in violation of the Constitution." *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989). "The difference is practical. The court wants to head off a situation where every lawful arrest would precipitate a civil rights suit over the amount of force used to effect the arrest; the requirement of physical injury serves as a filter." *Id.*

When officers are in unfamiliar territory where suspects could easily hide weapons, a court should not overlook the distinction between display of force and actual use of force and allow officers to err on the side of caution. A split-second hesitation could make all the difference for officers who put their lives at risk for the interest of the public.

Buelow's use of his sidearm to insure his safety, the safety of Bonvicino and Hopkins, was well within the range of reasonable conduct given the totality of the circumstances.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 16, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15102

D.C. No.
CV-05-02932-JSW

BRUCE HOPKINS,

Plaintiff-Appellee,

v.

A. BONVICINO, Badge No. 1140, individually & in his official capacity as a San Carlos Police Officer; DAVID BUELOW individually & in his official capacity as a San Carlos Police Officer; NICK NGUYEN, Badge No. 1141, individually in his official capacity as a San Carlos Police Officer; CITY OF SAN CARLOS,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of California, Jeffrey S. White, District Judge, Presiding

Argued and Submitted
October 20, 2008—San Francisco, California

Filed July 16, 2009

Appendix A

Before: Mary M. Schroeder, D.w. Nelson, and Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt

OPINION

REINHARDT, Circuit Judge:

On August 22, 2003, two San Carlos Police Officers broke into Bruce Hopkins' home. They did not have a warrant, nor did they have probable cause. All that they had was a statement from a third-party that Hopkins had been involved in an extremely minor traffic incident, an incident so minor that it did not cause as much as a scratch on either of the vehicles involved, and that he appeared to have been drinking. Based on this information, the officers broke into Hopkins' home with their flashlights shining and their guns drawn. When they found Hopkins, they handcuffed him, removed him from his house, and placed him under arrest.

The officers' explanation for their warrantless entry is both simple and audacious: They claim that, after hearing that Hopkins had the smell of alcohol on his breath, they feared he was on the brink of a diabetic coma and broke into his house in order to offer medical assistance. According to one officer's deposition testimony, they entered with their guns drawn because individuals suffering from diabetic emergencies "may sometimes be confused" and can be "combative." Apparently, in the officer's view, someone suffering from

such a medical emergency may need to be deterred by deadly force. Hopkins, however, was neither confused nor combative because he was not suffering from a diabetic emergency-he was lying in his bedroom watching television, which is where the officers found him. Yet, after the officers discovered that he was perfectly healthy and non-comatose, they did not say "we're glad to see that you are safe, sir; we'll be on our way now." They did not say, "Sorry for the disturbance and for damaging your property." No, instead they handcuffed Hopkins at gunpoint, removed him from his home, placed him under arrest, and brought him to the San Mateo County jail for the final chapter in the case of the nonexistent diabetes.

Hopkins sued the two officers who broke into his house, their colleague who waited outside, and the City of San Carlos under 42 U.S.C. § 1983. He asserts three causes of action: unlawful warrantless entry of a home, unlawful arrest without probable cause, and excessive use of force. The defendants jointly moved for summary judgment on all counts-the officers asserting a qualified immunity defense and the City arguing that it should not be held liable under *Monell v. N.Y. City Department of Social Services*, 436 U.S. 658 (1978). The district court denied the motion, and the defendant-officers now appeal.[1] Because "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Payton v. New York*, 445 U.S. 573, 585 (1980)

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1. The denial of summary judgment with respect to the City of San Carlos is not before us.

(quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972)), and because the officers' conduct here unequivocally violated Hopkins' clearly established constitutional rights, we affirm the denial of summary judgment with respect to Officers Bonvicino and Buelow, although we hold that their colleague, Officer Nguyen, is entitled to qualified immunity.

I. Factual and Procedural Background

On a Friday evening in late August of 2003, Bruce Hopkins finished his shift at work and went to the local American Legion Hall in San Carlos, California, for a drink.[2] After having a few beers he left to drive home. While en route, he was involved in a minor traffic incident with a car driven by Ms. Waheeda Talib. Both Talib and Hopkins agree that they each got out of their cars to inspect the vehicles for damage.[3] According to Hopkins, the two agreed that there was no damage and he continued on his way home. According to later police reports of the incident, Talib claimed that after exiting his car Hopkins denied responsibility for the incident and simply drove away.

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2. Because this case comes to us on defendants' motion for summary judgment, we take all facts in the light most favorable to Hopkins, the nonmoving party.

3. Talib did not testify in any depositions for this lawsuit nor did she submit any affidavits or responses to interrogatories. Her statements are drawn from the various police reports completed by the defendants in this case.

Appendix A

Despite minor discrepancies in the details of the traffic incident's immediate aftermath, the parties agree that Talib followed Hopkins to his home without Hopkins being aware that she was behind him. When Hopkins arrived home and left his car, Talib confronted him about the incident and accused him of being intoxicated. Talib later told the defendant-officers that she suspected Hopkins was under the influence of alcohol because when she spoke with him in front of his residence she smelled alcohol on his breath and observed that he seemed impaired and had difficulty walking. During her confrontation with Hopkins, Talib spoke on her cell phone. Fearing that she was either calling "her husband to come down there and beat [him] up or [that] she was calling the cops," Hopkins entered his house "as quick as he could." His exchange with Talib on his front lawn lasted no longer than a minute to a minute and a half. Once inside his home, Hopkins went to his bedroom in the basement to watch television.

Talib remained outside on Hopkins' lawn and called the police. She told the dispatcher that she had been involved in a hit-and-run accident, that she followed the driver to his house, and that she suspected he had been drinking. Shortly thereafter, San Carlos police officers Armand Bonvicino and Nick Nguyen arrived at Hopkins' residence. Officer Bonvicino, the "primary officer" for the call, asked Talib if she needed medical assistance; she said she did not. Talib then proceeded to tell Bonvicino and Nguyen about the traffic incident and reported that Hopkins appeared intoxicated when he got out of his vehicle. Officer Bonvicino walked to the

front door of Hopkins' house, knocked loudly, and announced himself as a police officer multiple times through an open window. He did not receive a response.

Officer Bonvicino then returned to the front lawn and conferred with Officer Nguyen and with Officer David Buelow, who had since arrived at the scene.[4] While Officer Nguyen continued to interview Talib, Officers Bonvicino and Buelow decided to walk to the side of the house in order to attempt to contact Hopkins through a side door. The side entrance to Hopkins' home had a screen door, which was closed and locked, and a solid door behind the screen, which was open. After knocking on the screen door and receiving no response, Officers Bonvicino and Buelow discussed with each other possible explanations for Hopkins' not answering. Among the explanations they came up with was the possibility that Hopkins was on the brink of a diabetic coma. As both officers later explained in their declarations and depositions, they had been trained that what a layperson might describe as the odor of alcohol on someone's breath could actually be the "fruity" smell associated with a diabetic emergency. With this potential medical emergency in mind, Officer Bonvicino loudly announced through the screen that he and Officer Buelow would be making an entry into the house to check on Hopkins' welfare.

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4. Officer Buelow had been Officer Bonvicino and Officer Nguyen's field training officer when they were both police department trainees.

Appendix A

Officer Bonvicino cut a hole in the screen, reached in, and unlocked the door. He and Officer Buelow then entered the residence with their flashlights on and their guns drawn. Inside, the officers searched for Hopkins in the areas of his home in which a person might be found. They discovered him lying on the floor in his bedroom, which was a converted garage space. According to Hopkins, he had never heard the officers' knocking and was terrified when they entered with their guns drawn and flashlights shining; he fell off the bed as they were coming down the stairs into his room. The officers asked Hopkins to get up, show his hands, and move toward them, which he did. At this point, Officer Bonvicino holstered his sidearm because, in his words, Hopkins "was not a threat to officer safety." Officer Buelow, however, continued to point his gun at Hopkins. Hopkins was then handcuffed and taken outside.

While Officers Bonvicino and Buelow were inside Hopkins' home, Officer Nguyen had been interviewing Talib and taking pictures of her and Hopkins' cars. Once Hopkins was brought outside, Talib positively identified him as the driver of the vehicle that had bumped into hers. After Officer Nguyen explained the mechanics of a citizen's arrest to her and provided her with a citizen's arrest form printed by the San Carlos police department, Talib executed a citizen's arrest of Hopkins for hit-and-run and asked the officers to take him into custody. The officers took Hopkins to the San Carlos Police Department. He was later charged with hit-and-run and driving under the influence and transferred to San Mateo County Jail. Hopkins' criminal charges were

quickly dropped once the judge in San Mateo Superior Court granted his motion to suppress the evidence against him on the ground that the officers' entry into his home was illegal.

After his criminal case concluded, Hopkins filed a civil complaint under 42 U.S.C. § 1983 in the Northern District of California, alleging, *inter alia*, that the officers violated his civil rights by entering his house without a warrant, arresting him without probable cause, and using excessive force. The defendant-officers filed a joint motion for summary judgment, contending that they did not violate Hopkins' constitutional rights, and, even if they did, that they are entitled to qualified immunity. The district court granted the motion with respect to Officer Nguyen's liability for excessive force, but otherwise denied the motion in all respects.

II. Standard of Review

A district court's decision denying summary judgment on the ground of qualified immunity is reviewed *de novo*. *See, e.g., Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945 (9th Cir. 2003). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Because the defense provides immunity from suit, not just a defense from liability, the denial of a motion for summary judgment predicated on qualified immunity is an immediately appealable collateral order. *Id.* at 528-30.

Appendix A

The qualified immunity analysis involves two separate steps. First, the court determines whether the facts "show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the alleged conduct did not violate a constitutional right, then the defendants are entitled to immunity and the claim must be dismissed. However, if the alleged conduct did violate such a right, then the court must determine "whether the right was clearly established" at the time of the alleged unlawful action. *Id.* A right is clearly established if "a reasonable official would understand that what he is doing violates that right." *Id.* at 202. If the right is not clearly established, then the officer is entitled to qualified immunity. While the order in which these questions are addressed is left to the court's "sound discretion," "it is often beneficial" to perform the analysis in the sequence outlined above. *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009). Of course, where a claim of qualified immunity is to be denied, both questions must be answered.

When determining whether there are any genuine issues of material fact at the summary judgment stage, the court must take all facts in the light most favorable to the non-moving party. In the context of qualified immunity, determinations that turn on questions of law, such as whether the officers had probable cause or reasonable suspicion to support their actions, are appropriately decided by the court. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). However, a trial court should not grant summary judgment when there is a genuine dispute as to "the facts and

circumstances within an officer's knowledge" or "what the officer and claimant did or failed to do." *Id.*

III. Warrantless Entry

Hopkins' first claim is that his constitutional rights were violated when, acting under color of state law, Officers Bonvicino and Buelow entered his house without a warrant in violation of the Fourth Amendment. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." *United States v. Martinez*, 406 F.3d 1160, 1163 (9th Cir. 2005) (internal quotation marks omitted) (quoting *Payton*, 445 U.S. at 586).

The presumption, however, is not irrebuttable. "There are two general exceptions to the warrant requirement for home searches: exigency and emergency." *Id.* at 1164. These exceptions are "narrow" and their boundaries are "rigorously guarded" to prevent any expansion that would unduly interfere with the sanctity of the home. *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005). In general, the difference between the two exceptions is this: The "emergency" exception stems from the police officers' "community caretaking function" and allows them "to respond to emergency situations" that threaten life or limb; this exception does "*not* [derive from] police officers' function

as criminal investigators." *United States v. Cervantes*, 219 F.3d 882, 889 (9th Cir. 2000) (emphasis added). By contrast, the "exigency" exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is "necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc).

Here, the defendant-officers attempt to justify their warrantless entry into Hopkins' home primarily on the basis of the emergency exception, but rely in the alternative on the exigency exception. We address these defenses in turn.

A. The Emergency Exception

This court has clearly held that a police officer may not enter a home to investigate a medical emergency or other immediate risk to life or limb unless he has "reasonable grounds" to believe an emergency is at hand and that his immediate attention is required. *Cervantes*, 219 F.3d at 888. Although the test we announced in *United States v. Cervantes*, 219 F.3d 882 (9th Cir. 2000), was altered by the Supreme Court in *Brigham City v. Stuart*, 547 U.S. 398 (2006), the reasonable grounds prong "survives *Brigham City*, and indeed remains the core of the . . . analysis." *United States v. Snipe*, 515

F.3d 947, 951 (9th Cir. 2008).[5] Under this prong, "law enforcement must have an *objectively reasonable basis* for concluding that there is an immediate need to protect others or themselves from serious harm." *Id.* at 951-52

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5. In *Cervantes*, we adopted a three part test for analyzing whether a warrantless entry is valid under the emergency exception. We held:

> (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

219 F.3d at 888. In *Brigham*, the Supreme Court intervened and altered the analysis by abrogating the second prong of the *Cervantes* test. The Court held that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.' " *Brigham City*, 547 U.S. at 404 (emphasis and second alteration in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

We then construed *Brigham* as requiring that officers executing a warrantless entry of a home "ha[ve] an objectively reasonable basis for concluding that there [i]s an immediate need to protect others or themselves from serious harm; and [that] the search's scope and manner [a]re reasonable to meet the need." *Snipe*, 515 F.3d at 952. This formulation, when combined with the third prong of *Cervantes*, which was unaffected by either *Brigham* or *Snipe*, states our circuit's current law governing the emergency exception.

(emphasis added). This "reasonable basis" requirement, clearly established by *Cervantes* in 2000 and reaffirmed by *Snipe* in 2008, is the core principle governing the officers' conduct in the present appeal.

We must "judge whether or not the emergency exception applies in any given situation based on the totality of the circumstances, and, as with other exceptions to the warrant requirement, the Government bears the burden of demonstrating that the search at issue meets these parameters." *United States v. Stafford*, 416 F.3d 1068, 1074 (9th Cir. 2005). Here, the defendant-officers contend that two possible medical emergencies justified their warrantless entry.

The officers' first argument is that because they were responding to a reported automobile accident they were authorized to enter Hopkins' home to see if he was injured as a result of that incident. However, taking the alleged facts in the light most favorable to Hopkins, the police officers were aware that the purported accident did not cause so much as a scratch to either of the cars involved, as is confirmed by the photographs of the vehicles taken that evening by Officer Nguyen. Furthermore, after speaking with Talib—the woman who called the police and spoke with them before they entered Hopkins' home, who was involved in the so-called "accident," and who observed Hopkins exit his car both at the scene of the incident and back at his home—the officers, in their own words, learned "*nothing*" regarding the nature of the accident that "caused [them] to be concerned for Mr. Hopkins' medical

condition." In short, there was absolutely no indication that the minor bump between the two cars was at all serious or that it had caused any type of medical emergency. Accordingly, the mere fact that the officers were responding to a minor "hit-and-run" cannot justify their warrantless entry into Hopkins' home.

Perhaps aware of the tenuous nature of this first argument, the officers put greater weight on their second purported medical emergency: the argument that they had reason to believe that Hopkins was suffering from or on the brink of a diabetic coma. This claim, however, is equally baseless, and, if permitted to serve as the basis for the warrantless home intrusion, would allow police officers to ignore the Fourth Amendment almost at will. No one disputes that a diabetic coma is a medical emergency, which it clearly is. Rather, the question before us is whether Officers Bonvicino and Buelow had an "objectively reasonable basis" to suspect that Hopkins was in fact *suffering* from a diabetic coma. *Snipe*, 515 F.3d at 951. Taking the facts in the light most favorable to Hopkins, the only information the officers possessed that would support such a conclusion is as follows: (1) Talib said she smelled alcohol on Hopkins' breath; (2) Talib described Hopkins as appearing slightly intoxicated; and (3) Hopkins did not respond when the officers knocked on his door. The officers argue that, because an individual suffering from the initial phases of a diabetic coma can, to an untrained observer, appear intoxicated and can have a "sickly sweet" or "fruity" odor on his breath that a layperson might confuse with the smell of alcohol, their fear of a

diabetic emergency was reasonable. This contention is unsupportable: the mere suggestion that someone has a smell resembling alcohol on his breath and appears slightly intoxicated does not create "reasonable grounds" to suspect a diabetic emergency sufficient to justify warrantless entry into a home. If it did, then, as the officers acknowledged at oral argument, *any time* the police receive information from a layperson that someone inside a home has the appearance of a person who has consumed alcohol the police will be authorized to enter that home without a warrant. This result would expand the "narrow[,] . . . rigorously guarded exception[ ] to th[e] warrant requirement" beyond all recognition, and simply cannot be the law. *Stafford*, 416 F.3d at 1073.[6]

As this court has made clear, "if [police officers] otherwise lack reasonable grounds to believe there is an emergency," they must "take additional steps to determine whether there [i]s an emergency that justifie[s] entry in the first place." *United States v. Russell*, 436 F.3d 1086, 1092 (9th Cir.2006). Here, the officers did not take any such additional steps. They did not, as in *Martin v. City of Oceanside*, 360 F.3d 1078, 1080 (9th Cir. 2004), attempt to reach Hopkins by

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6. The officers' contention is especially troubling in light of the large percentage of police activity that involves some report of alcohol consumption. *See generally* BUREAU OF JUSTICE STATISTICS, ALCOHOL AND CRIME (1998) (reporting high correlation between alcohol involvement and suspected or actual criminal conduct), *available at* http://www. ojp. usdoj. gov/bjs/pub/pdf/ac.pdf.

telephone in order to check on his welfare. They did not ask Talib for more information, such as whether she observed Hopkins wearing a medical alert bracelet or whether the odor she smelled on his breath was "fruity," "sickly sweet," or otherwise distinguishable from the typical smell of alcohol on a person's breath. The mere fact that Hopkins did not answer the door cannot tip the balance in the officers' favor, since nothing requires an individual to answer the door in response to a police officer's knocking. *United States v. Washington*, 387 F.3d 1060, 1070-71 (9th Cir. 2004). We do not dispute that the police officers in this case had reasonable grounds to believe that Hopkins had been *drinking*, but, without obtaining more information, they could not reasonably have believed that he needed immediate medical attention due to a diabetic emergency.[7]

Every case in this circuit that has upheld a warrantless search of a home under the emergency exception has involved significantly more evidence of an emergency than is present here. In *Cervantes* itself, the searching officer, who had been trained to recognize the smell of highly combustible fumes associated with methamphetamine production, personally smelled those

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7. We also note that under *United States v. Snipe*, *see supra* note 5, we "must consider the officers' manner of entry." 515 F.3d at 952. Here, the officers entered the house with their guns drawn, a tactic that hardly seems consistent with a response to a medical emergency where the victim is expected to be comatose or quasi-comatose. Surely paramedics or emergency medical technicians responding to diabetic emergencies do not do so with guns drawn.

fumes emanating from an apartment after responding to a call from the fire department. 219 F.3d at 885-86. In *United States v. Bradley*, a mother who had just been arrested for possessing methamphetamine told the police that her nine-year old son was home alone in the middle of the night, a situation that we held "requir[ed] immediate police assistance." 321 F.3d 1212, 1215 (9th Cir. 2003). In *Martin v. City of Oceanside*, officers entered a house in response to a phone call from a father who called the police "with an urgent request to check on the safety of his daughter . . . [whom he] had been unable to reach . . . for several days." 360 F.3d at 1080. In *United States v. Martinez*, officers responding to a domestic violence call found a woman crying on the front lawn of a house and heard a man shouting from inside; in the unique context of "a domestic abuse call, [in which] 'violence may be lurking and explode with little warning,' " we upheld the officers' warrantless entry to speak to the screaming and potentially injured male resident. 406 F.3d at 1162-64 (quoting *Fletcher v. Clinton*, 196 F.3d 41, 50 (1st Cir. 1999)). In *United States v. Stafford*, we upheld a warrantless entry after a building maintenance man reported to police that the walls of an apartment were covered in blood and feces and that he smelled what he thought was a dead body. 416 F.3d 1068, 1071-73 (9th Cir. 2005). In *United States v. Russell*, we upheld a warrantless entry where a series of confused 911 calls suggested that one individual had shot another inside a house and that the shooter was still inside when the officers arrived. 436 F.3d 1086, 1090 (9th Cir. 2006). Finally, in *United States v. Snipe*, the police entered a home in response to a 911 call in which a "very hysterical

sounding" caller "screamed . . . [g]et the cops here now." 515 F.3d at 949 (alteration in original).

A statement that someone's breath smelled like alcohol is not even remotely comparable to the information we have previously deemed to constitute "reasonable grounds" for suspecting a medical or other life-threatening emergency. It is simply inconceivable that a "reasonable officer" presented with the information that Talib conveyed to Officers Bonvicino and Buelow could conclude, on the basis of that information alone, that he had "an objectively reasonable basis" to suspect a medical emergency was at hand. Yet, as Officer Buelow acknowledged in his deposition, he believed that, hypothetically, any time an officer receives a report of alcohol consumption, that officer would, in his discretion, have reasonable grounds to enter a home without a warrant in order to investigate a diabetic emergency. Whatever this understanding of the Fourth Amendment might be called, it cannot be called "objectively reasonable." Thus, the emergency exception cannot justify the warrantless entry into Hopkins' home.

B. The Exigency Exception

The officers' alternative argument is that, although they claim to have entered Hopkins' house in response to a medical emergency, a reasonable officer would have been justified in entering the building in order to investigate a crime under the "exigent circumstances" exception. "[W]hen the government relies on the exigent

circumstances exception, it . . . must satisfy two requirements: first, the government must prove that the officer had probable cause to search the house; and second, the government must prove that exigent circumstances justified the warrantless intrusion." *United States v. Johnson*, 256 F.3d 895, 905 (9th Cir. 2001) (en banc). "Exigent circumstances" can include "the destruction of relevant evidence." *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc). Here, the officers claim that their entry was justified because a reasonable officer would have had probable cause to believe Hopkins had been driving under the influence of alcohol in violation of CAL. VEH. CODE § 23152, and that an immediate entry was necessary in order to obtain evidence of his blood alcohol content before the alcohol in his bloodstream metabolized.

We address the probable cause and exigent circumstances requirements in turn.

1. Probable Cause

As the officers concede, the only crime for which they can claim to have had probable cause to enter Hopkins' residence is driving under the influence of alcohol, a violation of CAL. VEH. CODE § 23152.[8] "Officers have

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8. The officers expressly waived below any argument that investigation of a potential hit-and-run could have justified their warrantless entry. They also acknowledge in their briefs on appeal that Talib's citizen's arrest, discussed *infra* Part IV.B, "is not a basis for [their] warrantless entry into the residence."

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probable cause for a search when 'the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.' " *United States v. Henderson*, 241 F.3d 638, 648 (9th Cir. 2000) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

This court has held that "[i]n establishing probable cause, officers may not solely rely on the claim of a citizen witness that [s]he was a victim of a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (citing *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) ("[P]olice officers ha[ve] a duty to conduct an investigation into the basis of [a] witness' report")). In violation of the rule set forth in *Arpin* and *Fuller*, the officers here entered Hopkins' home based *solely* on the information they obtained from Talib-namely, that she had been involved in an extremely minor car accident with Hopkins, that she smelled alcohol on his breath, and that he appeared intoxicated. The officers did not inspect Hopkins' car to see if the hood was still warm, *cf. People v. Thompson*, 135 P.3d 3, 5-8 (2006), which would have corroborated Talib's

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(Cont'd)

And so they must, as their own police reports indicate that Talib did not authorize a citizen's arrest until *after* the officers entered Hopkins' home. Even if a stand-alone citizen's arrest could justify a warrantless home entry—a dubious proposition, *see infra* Part IV.B—the sequence of events here does not support such a justification.

statement that the car had recently been driven, nor did they inspect the vehicle for any evidence of reckless driving or of alcohol consumption, such as open containers or an alcoholic odor. They did not ask Talib any questions in order to gain information beyond her cursory and conclusory statements, such as whether she observed Hopkins driving erratically or at an abnormal speed. In short, the officers obtained no information whatsoever beyond Talib's brief statement. Under *Arpin* and *Fuller,* these statements from a witness, without further investigation by the police, are insufficient to support probable cause.[9]

2. Exigent Circumstances

Even if the officers had probable cause that Hopkins had been driving under the influence (and even if that would have been sufficient for entry into his home pursuant to a warrant), more is required to justify a *warrantless* entry into his house. The Fourth

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9. We need not decide whether even if the officers had obtained independent evidence supporting Talib's allegations, the "probable cause" this information provided would have been sufficient to justify the issuance of a warrant to search Hopkins' home for evidence of the minor misdemeanor violation at issue here. Whether a home, or the homeowner in his home, may be searched pursuant to a warrant for evidence of a minor motor vehicle violation involving neither personal injury nor property damage raises a serious question in our minds and would require the balancing of the interests of the homeowner in the right to privacy in his home versus the state's interest in searching homes for evidence of such minor criminal violations.

Amendment requires that there be exigent circumstances for a warrantless entry. *See, e.g., Johnson*, 256 F.3d at 907-09. The defendants contend that a reasonable officer would have been justified in entering Hopkins' home in order to obtain evidence of his blood-alcohol ratio, and that the rapid metabolizing of the alcohol in his blood would constitute exigent circumstances. This argument would seem to be directly foreclosed by *Welsh v. Wisconsin*, a case in which the United States Supreme Court held that "a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." 466 U.S. 740, 754, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984); *see also id.* at 748, 104 S.Ct. 2091(holding that the same analysis applies to "agents of the government who seek to enter the home for purposes of search or arrest"). *Welsh* involved an investigation of alleged misdemeanor drunk driving, just as did Hopkins' case. However, relying on *People v. Thompson*, 135 P.3d 3 (2006), a California Supreme Court decision, the officers argue that *Welsh* is distinguishable because the Wisconsin DUI law at issue in that case was a "nonjailable" offense, whereas in California DUI is a misdemeanor punishable by up to six months in county jail.

The appellants are correct that three years after they broke into Hopkins' home the California Supreme Court sought to distinguish *Welsh* on the basis of a difference between jailable and nonjailable offenses. *See id.* at 9("We therefore believe *Welsh* was limited to Wisconsin's 'amazing' decision to classify DUI as a civil

nonjailable offense. . . ."). However, this is *not* the distinction that the United States Supreme Court drew in *Welsh*, nor is it the distinction that this circuit has repeatedly emphasized in its own exigency-exception decisions. To the contrary, in *Welsh* the Supreme Court held that the exigency analysis must turn on "the *gravity* of the underlying offense," 466 U.S. at 753 (emphasis added), not its status as "jailable" or "nonjailable." The Court specifically said that a finding of exigent circumstances is particularly inappropriate "when the underlying offense . . . is relatively minor," *id.* at 750 (emphasis added), and cited favorably "those courts addressing the issue [that] have refused to permit warrantless home arrests for *nonfelonious* crimes." *Id.* at 752 (emphasis added). The Supreme Court expressly did *not* limit its holding in *Welsh* to nonjailable offenses,[10] *see id.* at 753; to the contrary, it suggested that exigent circumstances can rarely, if ever, support entry into a home to investigate or arrest someone for a misdemeanor offense.

Building on the felony/misdemeanor distinction discussed in *Welsh*, this circuit has clearly held that "an exigency related to a misdemeanor will seldom, if ever, justify a warrantless entry into the home." *LaLonde v. County of Riverside*, 204 F.3d 947, 956 (9th Cir. 2000) (citing *Welsh*, 466 U.S. at 752-53). In *United States v.*

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10. In fact, the offense for which Welsh himself was ultimately charged *was* a jailable offense under Wisconsin law, although the offending officers did not know this at the time they entered his home. *See Welsh*, 466 U.S. at 746 n. 6.

Johnson, we analyzed en banc a warrantless search of a home and noted that "in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the 'rarest' cases." 256 F.3d 895, 909 n. 6 (9th Cir. 2001) (en banc) (quoting *Welsh*, 466 U.S. at 753). Because *Johnson* and *LaLonde* relied on and directly cited *Welsh* for the proposition that investigation of a misdemeanor will rarely, if ever, support exigent circumstances, *see id.* at 908, it is clear that, whatever "rare" circumstances might justify a warrantless home entry to investigate a misdemeanor, misdemeanor driving while under the influence, the very offense at issue in *Welsh* and cited by *Johnson*, does not fall within that very narrow exception. Here, the offense that the officers claim supports their warrantless entry is indisputably a misdemeanor, *see* CAL. VEH. CODE §§ 23152, 23536; CAL. PENEL CODE § 17 (2008) (defining misdemeanor). More important, it is the precise offense that the Supreme Court held insufficient to justify a warrantless entry in *Welsh*. Accordingly, even were there probable cause that Hopkins had in fact been driving under the influence, a warrantless entry into his home was unjustified.

The fact that the California Supreme Court expressed its disagreement with the United States Supreme Court several years after the officers broke into Hopkins' home and that it took a different view of the Fourth Amendment than this circuit and the United States Supreme Court does not alter our conclusion in this case. It is the federal courts that are the final

arbiters of federal constitutional rights, not the state courts. *See, e.g., Bennett v. Mueller*, 322 F.3d 573, 582 (9th Cir. 2003) ("[S]tate courts will not be the final arbiters of important issues under the federal constitution." (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940))). This court's precedents make clear that a warrantless home entry to obtain evidence of a misdemeanor offense is "seldom, if ever" constitutional, and that it was certainly unconstitutional here. *LaLonde*, 204 F.3d at 956.

Accordingly, the exigency exception is inapplicable here for two independent reasons-absence of probable cause and absence of exigent circumstances-either of which is sufficient to compel our holding that the officers' forced entry into Hopkins' home violated his Fourth Amendment rights.

C. Officer Nguyen

To this point, we have discussed the conduct of Officer Buelow and Officer Bonvicino, but not the conduct of Officer Nguyen, who remained outside with Talib while his colleagues broke into Hopkins' home. The district court granted Officer Nguyen's motion for summary judgment with respect to Hopkins' claim of excessive force, but denied the motion with respect to the unlawful entry claim. Hopkins argues that Officer Nguyen should not enjoy qualified immunity on the warrantless-entry claim because Nguyen was an "integral participant" in the search. This argument, however, misunderstands our circuit precedent.

In *Chuman v. Wright*, 76 F.3d 292 (9th Cir. 1996), we rejected "the 'team effort' standard [that] allows the jury to lump all the defendants together, rather than require it to base each individual's liability on his own conduct." 76 F.3d at 295. In that case, we held that a police officer's "[b]eing a mere bystander [to his colleagues' conduct] was insufficient" to support § 1983 liability. *Id.* at 294.

Hopkins seeks to distinguish *Chuman* by relying on the "integral participant" rule, which, as its name suggests, extends liability to those actors who were integral participants in the constitutional violation, even if they did not directly engage in the unconstitutional conduct themselves. However, this rule requires more participation and support on the part of a particular defendant than the undisputed facts in this case show Officer Nguyen to have provided. Under the integral participant rule, "an officer who does not enter an apartment, but *stands at the door, armed with his gun*, while other officers conduct the search, can . . . be a 'full, active participant' in the search" and therefore can be subject to § 1983 liability. *Boyd v. Benton County*, 374 F.3d 773, 780 (9th Cir. 2004) (emphasis added). Each of the cases cited in *Boyd* in which the "integral participant" rule was deemed satisfied involved officers who "provided armed backup during an unconstitutional search." *Id.* While the "integral participant" rule may extend liability beyond simply those officers who provide "armed backup," it is clear that an officer who waits in the front yard interviewing a witness and does not participate in the unconstitutional search in any fashion cannot be held liable under *Chuman*.

Hopkins argues that Officer Nguyen is not entitled to qualified immunity because he was part of a conversation in which the three officers formed a "plan of action" to enter the house. However, the undisputed facts show that the decision to enter Hopkins' home was not made or discussed during that conversation, but rather was made in a separate conversation between Officers Buelow and Bonvicino at the side entrance to Hopkins' house.[11] Accordingly, Officer Nguyen participated in neither the planning nor the execution of the unlawful search. We therefore reverse the district court with respect to Officer Nguyen's liability and hold that he is entitled to qualified immunity on the unlawful search claim.

D. Clearly Established Law

Because Officer Nguyen did not commit a constitutional violation with respect to Hopkins'

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11. We also note that there is no allegation that Officer Nguyen either ordered the unconstitutional search or directed it from afar. To the contrary, the record is clear that Officer Bonvicino was the "primary agent" on the scene. It is also clear that Officer Buelow was the most senior officer, as he had been both Officer Bonvicino's and Officer Nguyen's Field Training Officer. Thus, the rule that "[a] supervisor may be held liable under § 1983 'if he or she was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation' " does not apply to Officer Nguyen. *Lolli v. County of Orange*, 351 F.3d 410, 418 (9th Cir. 2003) (quoting *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir. 2001)).

warrantless-entry claim, we need not proceed to the second step of the qualified-immunity analysis with respect to him. However, because both Officer Bonvicino and Officer Buelow did violate Hopkins' Fourth Amendment rights by forcibly entering his home without a warrant in the absence of any valid justification under either the emergency or exigency exceptions, in order to determine whether they are entitled to qualified immunity on this claim we must examine whether the contours of those two exceptions were clearly established in 2003 when they engaged in the conduct at issue.

To begin with the emergency exception, our decision in *United States v. Cervantes* clearly establishes that at the time of the officers' warrantless forced entry into Hopkins' home "[t]he police [were required to] have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance." 219 F.3d at 888. That opinion, which set forth the governing legal standard, was decided in June of 2000, over three years before Officers Buelow and Bonvicino engaged in their warrantless entry. Our previous discussion, *see supra* Part III.A, makes clear that it was patently *unreasonable* for Buelow and Bonvicino to believe that a diabetic emergency was at hand based simply on Talib's description of Hopkins as slightly inebriated. Our qualified immunity analysis, however, presents a somewhat different question than whether there were "reasonable grounds to believe that there [wa]s an emergency at hand;" *id.*; in determining whether the officers' conduct violated clearly established

law, we must ask whether in 2003 a *"reasonable officer" would have known* that he lacked "reasonable grounds to believe that there [wa]s an emergency at hand." *See Saucier v. Katz*, 533 U.S. 194 (2001); *Robinson v. Solano County*, 278 F.3d 1007, 1012 (9th Cir. 2002) (en banc) ("[T]he standard of reasonableness for purposes of qualified immunity is distinct from the standard of reasonableness embodied in the Fourth Amendment."). Here, we unhesitatingly conclude that a reasonable officer would indeed have known that the emergency exception to the Fourth Amendment would not encompass a warrantless entry into a home based solely on statements from a third party that an individual inside the home appeared inebriated prior to entering the residence. No reasonable officer, indeed no reasonable person, upon hearing that someone appeared or smelled somewhat inebriated could, without any further information, reasonably conclude that such a person was on the brink of a diabetic coma. To the contrary, a reasonable officer hearing such a description would conclude that the individual had consumed alcohol—conduct that would most certainly *not* justify a warrantless entry into a home. As we have previously held, when there is a "complete lack of evidence that would support a reasonable suspicion," and the officers have provided a "wholly inadequate justification for the[ir] search, we conclude that it would have been clear to a reasonable officer that [such a search] was unlawful." *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1023 (9th Cir. 2009). Similarly, in 2003, no reasonable officer would have believed that, where a two-car automobile incident resulted in damage to neither car and the

drivers of both cars drove off without any apparent physical complaint or difficulty, he should be sufficiently concerned about possible injuries to one of the drivers to forcibly enter his home in order to conduct an investigation regarding his possible injuries. As a result, the defendants are not entitled to qualified immunity under the emergency exception.

As for the exigency exception, both our conclusions that the officers lacked probable cause to enter Hopkins' home and that an investigation of a potential misdemeanor drunk-driving incident does not create an exigent circumstance were clearly established at the time the officers broke into the plaintiff's home. As to probable cause, this court determined as early as 1991 that "police officers ha[ve] a duty to conduct an investigation into the basis of [a] witness' report" and that absent such investigation the report alone does not support probable cause. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991). This rule was reaffirmed a mere two years before the conduct at issue in this case. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001). It was equally clearly established by 2003 that "an exigency related to a misdemeanor will seldom, if ever, justify a warrantless entry into the home." *LaLonde v. County of Riverside*, 204 F.3d 947, 956 (9th Cir. 2000). Moreover, we made clear a year later, in *United States v. Johnson*, that "where the underlying offense is only a misdemeanor," *such as the misdemeanor drunk-driving* at issue in *Welsh*, "law enforcement must yield to the Fourth

Amendment." 256 F.3d 895, 909 n. 6 (9th Cir. 2001) (en banc) (quoting *Welsh*, 466 U.S. at 753, 104 S.Ct. 2091).

The California Supreme Court's decision in *People v. Thompson* distinguishing *Welsh* cannot alter our conclusion that the prohibition of warrantless entry into a home to investigate misdemeanor drunk-driving was "clearly established" at the time Officers Buelow and Bonvicino broke into Hopkins' home. For one thing, *Welsh*, *LaLonde*, and *Johnson*—binding precedents from the Supreme Court and this court clearly establishing that rule—all predate the conduct underlying this lawsuit, whereas *People v. Thompson* was decided three years *after* the officers' unconstitutional action. Furthermore, a decision by a state court contrary to a holding of this court cannot unsettle or "de-establish" the clarity of *federal* law. Although "[t]he Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury," we have held that "[i]n the Ninth Circuit, we begin our inquiry by looking to binding precedent. If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end." *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004) (internal citation omitted) (citing *Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985)). Thus, with respect to the lack of probable cause and the lack of exigent circumstances—the absence of either one of which would preclude the officers' reliance on the exigency exception—the law as

to both was clearly established in 2003 and the officers are not entitled to qualified immunity on the basis of that exception. Because it was also clearly established that the officers' conduct did not fall within the emergency exception, the two defendants are not entitled to qualified immunity on that basis either. Accordingly, the officers were properly denied summary judgment as to Hopkins' warrantless-entry claim.

IV. Arrest Without Probable Cause

The officers also appeal the denial of their qualified-immunity defense with respect to Hopkins' claim of unlawful arrest. This claim encompasses two different arrests: one that occurred inside Hopkins' home, and a second that occurred once he was brought outside and placed under citizen's arrest. We analyze the two arrests separately.[12]

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12. In *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (en banc), this court held that an "armed standoff was a single Fourth Amendment event, a continuous process of formalizing [an] arrest." *Id.* at 1077. Here, by contrast, two *distinct* seizures took place, one occurring after the other was already accomplished. Drawing a distinction between two consecutive and overlapping "seizures" is a common and longstanding practice in Fourth Amendment jurisprudence, as in the case of so-called "*Terry* stops," *see Terry v. Ohio*, 392 U.S. 1, 16-19 (1968); *see also, e.g., Rohde v. City of Roseburg*, 137 F.3d 1142, 1144 (9th Cir. 1998), or of unconstitutionally excessive force, *see Chavez v. Martinez*, 538 U.S. 760, 773 n. 5 (2003) (plurality opinion); *Graham v. Connor*, 490 U.S. 386, 388, 394 (1989); *Pierce v. Multnomah County*, 76 F.3d 1032, 1042 (9th Cir.

(Cont'd)

Appendix A

A. Arrest In Hopkins' Home

The Fourth Amendment protects against warrantless arrest inside a person's home in the same fashion that it protects against warrantless searches of the home, which is to say that police officers may not execute a warrantless arrest in a home unless they have both probable cause and exigent circumstances. *See, e.g., Payton*, 445 U.S. at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."); *Welsh*, 466 U.S. at 749 ("[W]arrantless . . . arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent

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(Cont'd)

1996) (quoting *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985)). These longstanding precedents demonstrate that generally an individual who has already been seized can still be *further* seized for purposes of the Fourth Amendment-a proposition that is not inconsistent with *Fisher* 's holding that Fourth Amendment infringements suffered between the initiation of a seizure and the perfection, or "formalizing," of that same seizure may not be analyzed independently for purposes of the warrant requirement. *Fisher*, 558 F.3d at 1077.

Here, Hopkins' second seizure did not occur in the "process of formalizing" his first seizure, *id.*, which was accomplished, at the latest, when he was led from his house in handcuffs. *See infra* 34-35. Rather, much like a *Terry* stop followed by a formal arrest, the first seizure here preceded the second. Accordingly, the two arrests were independent Fourth Amendment events that can independently support separate causes of action under § 1983.

circumstances."). In light of the above, because Hopkins was in fact seized inside his home, Officers Buelow and Bonvicino violated his Fourth Amendment rights by arresting him without a warrant for the same reasons that their emergency and exigency defenses fail to justify their warrantless entry. *See supra* Part III.B.

An arrest—or, to use the Fourth Amendment's terminology, a "seizure"—"occurs when a law enforcement officer, through coercion, 'physical force[,] or a show of authority, in some way restricts the liberty of a person.'" *United States v. Washington*, 387 F.3d 1060, 1069 (9th Cir. 2004) (quoting *United States v. Chan-Jimenez*, 125 F.3d 1324, 1325 (9th Cir. 1997)). "A person's liberty is restrained when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 437, 111 S.Ct. 2382 (1991)). Here, taking the facts in the light most favorable to Hopkins, Officers Buelow and Bonvicino entered his home with guns drawn, ordered him to show his hands, told him that he was under arrest, handcuffed him, and took him outside. Under these circumstances, it is clear that the officers restricted his liberty and seized him. *See, e.g., United States v. Washington*, 490 F.3d 765, 772 (9th Cir. 2007) (considering fact of police officer's "directing [someone] where to walk" in holding that a seizure occurred); *United States v. Manzo-Jurado*, 457 F.3d 928, 934 n. 3 (9th Cir. 2006) (holding that a police officer's order to

occupants of a truck to "show their hands" was a seizure); *United States v. Bravo*, 295 F.3d 1002, 1010 (9th Cir. 2002) ("Certainly handcuffing is a substantial factor in determining whether an individual has been arrested.").

Numerous precedents from this court and others, including the United States Supreme Court, make it clear that the officers' treatment of Hopkins inside his home constituted a seizure. There can be no doubt that the law in this respect was clearly established prior to 2003 and thus should have been known by a reasonable officer. *See, e.g., Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Bostick*, 501 U.S. at 437; *Chan-Jimenez*, 125 F.3d at 1326. Accordingly, we affirm the district court's order denying Officers Buelow and Bonvicino's motion for summary judgment on qualified immunity grounds with respect to Hopkins' unlawful arrest claim. However, because Officer Nguyen did not participate in the arrest inside Hopkins' home, we reverse the district court's denial of his motion for summary judgment with respect to this arrest. *See supra* Part III.C.

B. Citizen's Arrest

Hopkins also alleges that he was arrested for "hit-and-run" without probable cause.[13] This second arrest

13. Unlike in the other claims alleged, Officer Nguyen was an integral participant in this arrest because he provided Talib with the citizen's arrest form and explained the procedure to her.

was executed pursuant to Talib's authority to perform a citizen's arrest under CAL. PENEL CODE § 837, which allows "[a] private person [to] arrest another . . . [f]or a public offense committed or attempted in h[er] presence." The issue with respect to this second arrest is thus whether, under the federal Constitution, police officers are required to have independent probable cause when effectuating an arrest authorized by a private citizen.

We first addressed this question in *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912 (9th Cir. 2001). In that case, a woman who was arrested after having an argument with a city bus driver later brought suit under § 1983. We concluded that the "bus driver[ ] made a citizen's arrest . . . and delegated to [the][o]fficers . . . the task of taking [the plaintiff] into custody." 261 F.3d at 920. We upheld the grant of summary judgment to the officers on the plaintiff's state-law claims for false arrest because California law explicitly exempts officers effectuating a citizen's arrest from civil liability. *See* CAL. PENEL CODE § 847. However, we reversed dismissal of the plaintiff's federal claims, holding that the officers could be liable under the Fourth Amendment because they did not have sufficient independent probable cause to arrest Arpin. *See Arpin*, 261 F.3d at 925.

Given *Arpin*'s rule that the federal Constitution requires police officers to have independent probable cause when effectuating a citizen's arrest, and taking the facts in this case in the light most favorable to

Hopkins, the defendant-officers violated Hopkins' constitutional rights when they took him into custody because they did not have probable cause to support Talib's arrest for hit-and-run. The hit-and-run statute on which Talib predicated her arrest contains as an element that there be some damage to the vehicles (or to some other property). *See* CAL. VEH. CODE § 20002; *People v. Carbajal*, 899 P.2d 67, 72 n. 10 (1995) ("The essential elements of a violation of section 20002[include] that the defendant: . . . knew damage resulted from the accident. . . ."). However, Officer Nguyen personally inspected and took photographs of the vehicles involved in the purported "accident," and those photographs do not appear to show *any* damage to the cars. "In this procedural context, where summary judgment [is at issue], we must credit the video evidence submitted by [the non-moving party]." *Menotti v. City of Seattle*, 409 F.3d 1113, 1150 (9th Cir. 2005). Furthermore, Hopkins also asserted in his deposition that "there was nothing wrong with either vehicle," an assertion we must take as true. If there was no damage to the cars, then the officers did not have probable cause to believe that a violation of § 20002 had occurred. Therefore, Hopkins has properly alleged that the officers acted unlawfully when they took him into custody on the basis of Talib's citizen's arrest without independent probable cause.

Having concluded that the officers violated Hopkins' rights, we must next consider whether the rule that independent probable cause must support an officer's effectuation of a citizen's arrest was clearly established at the time Hopkins was arrested. This is a close

question. We conclude that even though *Arpin* was decided two years before the conduct at issue in this case, the rule it sets forth was not clearly established at the time of Hopkins' arrest. Although *Arpin* held that it was analyzing a citizen's arrest when it discussed the officers' liability under the state-law claims at issue, when the court turned its attention to the federal claims it described the municipal bus driver who executed the citizen's arrest as "act[ing] 'with the intent to assist the government in its investigatory . . . purposes.' " *Arpin*, 261 F.3d at 924(quoting *United States v. Attson*, 900 F.2d 1427, 1433 (9th Cir. 1990)). Accordingly, the court held that the citizen "summoned the police . . . not for an independent purpose, but as a governmental employee acting with the intent to assist the . . . County." *Id.* In light of this language, *Arpin* could reasonably be read to suggest that the citizen bus driver was acting as an agent of the state, and therefore not executing a true citizen's arrest.[14] *Cf.* CAL. PENEL CODE § 837(defining citizen's arrest as executed by a "private person"). Given this lack of clarity, a reasonable officer might not have known that taking Hopkins into custody solely on the basis of the citizen's arrest in this case violated the Fourth Amendment.

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14. The *Arpin* court further held that the officers in that case did not have independent probable cause to arrest the plaintiff, but it is unclear whether the court's holding simply rearticulated the rule announced in *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443 (9th Cir. 1991), that a statement from an aggrieved witness is insufficient to support probable cause.

Appendix A

Since *Arpin* was decided, both our court and a district court in this circuit have held in unpublished opinions that the "teachings in *Arpin* . . . require police officers to conduct additional investigation on a citizen's arrest" in order to establish independent probable cause prior to effectuating that arrest. *Sin v. Crystal Park Hotel Casino*, 77 Fed.Appx. 433, 434 (9th Cir. 2003) (internal citation omitted); *accord Salisbury v. Ward*, No. 06-2993-MMC, 2006 U.S. Dist. LEXIS 94025 at *10-11 (N.D. Cal. Dec. 19, 2006) ("[The requirement] that a '. . .' applies even when the arrestee is taken into custody pursuant to a citizen's arrest."). However, while unpublished opinions "can be considered in determining whether the law was clearly established," *Bahrampour v. Lampert*, 356 F.3d 969, 977 (9th Cir. 2004), both of these opinions were issued after the underlying conduct in this lawsuit, which renders them incapable of making the right at issue clearly established at the time of the violation.

Because *Arpin* is unclear as to whether the bus driver in that case was acting as a quasi-law enforcement officer or as a private citizen in executing the arrest, we hold that the requirement that a police officer establish independent probable cause before taking individuals into custody solely on the basis of a citizen's arrest was not clearly established in 2003. *Arpin* 's less-than-clear reasoning makes it uncertain whether at that time a "reasonable officer" would have known that it was unlawful to take Hopkins into custody solely because Talib had arrested him. It is equally uncertain whether such an officer would have known that he needed

independent probable cause in order to do so.[15] Accordingly, we hold that although Hopkins' second arrest did indeed violate his constitutional right to be free from seizure absent probable cause, the officers are entitled to qualified immunity with respect to that arrest.[16]

V. Excessive Force

Hopkins' final claim is that the officers employed excessive force in executing the arrest inside his house.

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15. Until a year prior to the time when Hopkins was arrested, a California police officer who refused to take an individual into custody following a citizen's arrest could "be punished by a fine not exceeding ten thousand dollars ($ 10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year;" that provision has since been repealed. CAL. PENEL CODE § 142 (2001), *amended by* Assem. No. 1835, 2001-2002 Sess. (Cal. 2002).

We do not mean to imply that a conflict between an officer's liability under state law versus under federal law creates a lack of clearly established federal law. Rather, when faced with a close question regarding whether the federal law itself is clearly established, we simply note that the fact that state law immunizes similar conduct may tend to support an officer's claim of qualified immunity.

16. Our holding therefore excuses Officer Nguyen from all liability, including liability for the excessive force claim, and dismisses him as a defendant in this case. Officers Bonvicino and Buelow, however, are not entitled to qualified immunity with respect to either the warrantless entry into Hopkins' home or the warrantless arrest inside his home.

It is clearly established that the use of excessive force in effecting a seizure violates the Fourth Amendment. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). The law of this circuit regarding excessive force as it relates to the use by police officers of drawn firearms was established by the en banc court in *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002) (en banc). In that case, we held that "pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger." *Id.* at 1015. In *Robinson*, the court held that a constitutional violation had occurred where the officers pointed their guns at the plaintiff and "[t]he crime under investigation was at most a misdemeanor[,] the suspect was apparently unarmed and approaching the officers in a peaceful way[,][t]here were no dangerous or exigent circumstances apparent at the time of the detention, and the officers outnumbered the plaintiff." *Id.* at 1014.

Taking the facts in the light most favorable to the plaintiff, it is clear that this case is indistinguishable from *Robinson*. Officer Bonvicino stated in his declaration that, at least as of the time Hopkins got up from the bedroom floor, he knew that Hopkins "was not a threat to officer safety." However, Officer Buelow makes clear in his declaration that he did not holster his weapon until after Hopkins was handcuffed, sometime after Officer Bonvicino described Hopkins as nonthreatening. Furthermore, the facts in the record, including the officers' own testimony that their reason for forcefully entering Hopkins' home was that they suspected he was

suffering from a medical emergency, suggest that they were fully aware at all times that Hopkins did not pose a threat to anyone. As to the other facts described in *Robinson*, there is no dispute that the officers here outnumbered Hopkins, that he was unarmed, and that any putative crime the officers might have been investigating was a misdemeanor. Because *Robinson* was the law of this circuit at the time the officers arrested Hopkins, it was clearly established that the force they used was excessive. Accordingly, the district court's denial of summary judgment on this ground with respect to Officers Bonvicino and Buelow is affirmed. The district court's grant of summary judgment on this claim in favor of Officer Nguyen, who did not participate in the arrest inside Hopkins' home, is also affirmed. *See supra* note 16 and *supra* Part III.C.

Conclusion

The district court's denial of summary judgment with respect to Officers Bonvicino and Buelow is **AFFIRMED** except with respect to the citizen's arrest part of the warrantless-arrest claim. The grant of summary judgment in favor of Officer Nguyen with respect to the excessive force claim is also **AFFIRMED.** The denial of summary judgment to Officer Nguyen with respect to the unlawful warrantless entry and unlawful arrest claims is **REVERSED.** The case is **REMANDED** for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B — ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED DECEMBER 21, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 05-02932 JSW

BRUCE HOPKINS,

Plaintiff,

v.

OFFICER A. BONVICINO, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This matter comes before the Court upon consideration of the motion for summary judgment filed by Defendants Armand Bonvicino ("Bonvicino"), David Buelow ("Buelow"), Nick Nguyen ("Nguyen") (collectively the "Defendant Officers"), and the City of

San Carlos ("City") (collectively "Defendants"). Having considered the parties' pleadings, relevant legal authority, and having had the benefit of oral argument, the Court HEREBY GRANTS IN PART AND DENIES IN PART Defendants' motion.

BACKGROUND

On July 19, 2005, Hopkins filed his complaint alleging violations of 42 U.S.C. § 1983 against the Defendants. Hopkins claims that the Officer Defendants violated his constitutional rights: (1) to be free from unreasonable searches and seizures; (2) to be free from arrest without probable cause; and (3) to be free from the use of excessive force.[1] The City's liability for these actions is premised on *Monell v. Dep't of Social Sevcs.*, 436 U.S. 658 (1978). Hopkins' claims arise from an incident that occurred on August 22, 2003.

On that date, Hopkins stopped at the American Legion and had three to four sixteen-ounce beers. (Declaration of Todd Master ("Master Decl."), Ex. A

1. Hopkins did not oppose the Defendants' motion on his claims that the Defendants allegedly violated his rights to be free from cruel and unusual punishment, to be free from interference with his zone of privacy, and to be free from inclusion in permanent government records branding an innocent citizen as a suspect of criminal activity. At the hearing he conceded that the Defendants are entitled to judgment on those aspects of his Section 1983 claim. Accordingly, Defendants' motion is GRANTED as to those claims.

(Deposition of Bruce Hopkins) at 58:21-60:2.)[2] Although Hopkins does not recall what time he left the American Legion, on the way home he was involved in a traffic accident and hit a car driven by a woman named Waheeda Talib. (*See, e.g., id.* at 65:10-22, 67:18-70:2.) After the accident, Ms. Talib followed Hopkins to his home. (*See, e.g., id.* at 69:19-70:2; Declaration of Nick Nguyen ("Nguyen Decl."), Ex. A.) When Hopkins arrived at his home, he discovered Ms. Talib had followed him. She accused him of drinking and hitting her car. Hopkins noted that she was on her cell phone and went inside his house. (Master Decl., Ex. A at 69:19-70:2, 73:22-76:8.) Once inside his house, Hopkins went to his furnished basement room and drank another four to five beers. (*Id.* at 84:21-25, 94:24-95:16.)

Ms. Talib apparently called the police, advised them that she had been involved in an accident and that she suspected the person who hit her had been drinking. Shortly thereafter, the Defendant Officers arrived at the scene. (Declaration of Carol Clark ("Clark Decl."), ¶ 4, Ex. A.) According to the police reports prepared at the time, Ms. Talib's suspicions were based on the fact that she smelled "the strong odor of an alcoholic beverage coming from his person." (*See* Declaration of Armand Bonvicino ("Bonvicino Decl."), Ex. A.)

Officer Bonvicino knocked on Hopkins' front door, but he received no response. *(Id.)* Officer Buelow arrived

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2. Hereinafter, the Court shall refer to the excerpts of Mr. Hopkins deposition that have been submitted by Defendants as "Master Decl., Ex. A at page:line."

on the scene, and the Defendant Officers agreed that Officer Nguyen would remain with Ms. Talib while Officers Bonvicino and Buelow would continue to try and contact Hopkins. The latter two officers proceeded to the side of the house, knocked on a screen door, and announced their presence. After again receiving no response, they entered Hopkins' home by cutting a hole in the screen door and opening it. (*See, e.g.*, Bonvicino Decl., Ex. A; Clark Decl., Ex. A.) Hopkins attests that did not hear the Defendant Officers before they entered his home. (Master Decl., Ex. A at 96:14-16.) The Defendant Officers claim they entered the home because they were concerned that Ms. Talib may have mistaken the smell of alcohol on Hopkins' breath for a fruity odor associated with a diabetic coma. The Defendant Officers based this concern on their training, rather than on any further information they received from Ms. Talib. (Bonvicino Decl., ¶ 8, Buelow Decl., ¶ 6; Bonvicino Depo. 77:7-11, 113:8-114:24.)

Having received no response, Officers Buelow and Bonvicino entered the house with their guns drawn. (Bonvicino Depo. at 118:14-24, 138:11-22.) They eventually located Mr. Hopkins in his room. Hopkins testified that both officers pointed their guns at him. (Master Decl., Ex. A at 70:3-16, 93:23-94:1, 103:15-19.)

Bonvicino and Buelow placed Hopkins in handcuffs and took him outside. Ms. Talib then identified Hopkins as the driver of the vehicle that hit her vehicle. Hopkins was arrested for a violation of California Vehicle Code § 20002(a), upon Ms. Talib's decision to make a citizen's

arrest. (Complaint, ¶¶ 9-13; Nguyen Decl., Ex. C.) Hopkins also was arrested for violation of California Vehicle Code § 23152, after Bonvicino conducted field sobriety tests and after his breath tests registered a blood alcohol content of .20 and .18. (Bonvicino Decl., ¶¶ 13, 15-17, Exs. A, B.)

ANALYSIS

A. Legal Standards Applicable to Motions for Summary Judgment.

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect the outcome of the case. *Id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S.

317, 323-24 (1986). The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Id.* at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *Id.* Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial ." Fed. R. Civ. P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)) (stating that it is not a district court's task to "scour the record in search of a genuine issue of triable fact"). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. Legal Standards Applicable to the Defense of Qualified Immunity.

The Defendant Officers assert that they are qualifiedly immune from suit on Hopkins' Section 1983 claims. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The privilege is an immunity from suit rather than a mere defense to liability. *Id.* As a result, the Supreme Court

has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (citing *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). In *Saucier*, the Supreme Court stated that a court called upon to rule on the issue of qualified immunity must ask the following threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *See id.* (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.*

However, if the Court finds that the facts would show the violation of a constitutional right, the next inquiry is to determine "whether the right was clearly established." *Id.* A constitutional right is clearly established for qualified immunity purposes if "the contours of the right [are] sufficiently clear that [at the time of the alleged unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Id.* at 202 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "In other words, an officer who makes a reasonable mistake as to what the law requires under a given set of circumstances is entitled to the immunity defense." *Boyd v. Benton Co.*, 374 F.3d 773, 781 (9th Cir. 2004) (citing *Saucier*, 533 U.S. at 205).

C. The Defendant Officers Not Entitled to Summary Judgment on Hopkins' Fourth Amendment Claims Relating to the Warrantless Entry and Subsequent Arrest.

1. Unreasonable Search and Seizure.

Hopkins claims the Defendant Officers violated his Fourth Amendment rights by entering when they entered his home without a warrant. The Fourth Amendment guarantees citizens the right "to be secure in their persons . . . against unreasonable . . . seizures" of the person. *Graham v. Connor,* 490 U.S. 386, 394 (1989). In addition, it is well established that " 'searches and seizures inside a home without a warrant are presumptively unreasonable.' " *LaLonde v. County of Riverside,* 204 F.3d 947, 954 (9th Cir. 2000) (quoting *Payton v. New York,* 445 U.S. 573, 590 (1980). Because it is undisputed that the Defendant Officers entered Hopkins' home without a warrant, unless a recognized exception to that requirement justifies their entry, Hopkins can establish the violation of a constitutional right.

The Defendant Officers rely primarily on the emergency exception to the warrant requirement to assert they were justified in entering Hopkins' home. *See Martin v. City of Oceanside,* 360 F.3d 1078, 1082 (9th Cir. 2004); *United States v. Cervantes,* 219 F.3d 882,

888 (9th Cir. 2000).[3] As an alternative to the emergency exception, the Defendant Officers rely on the fact that a warrantless entry may be justified when "the officers have probable cause *and* are presented with exigent circumstances." *LaLonde*, 204 F.3d at 954 (citing *Payton*, 445 U.S. at 590); *see also United States v. Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978) ("[A]bsent exigent circumstances, police who have probable cause to arrest a felony suspect must obtain a warrant before entering a dwelling to carry out the arrest.").

The Court finds there are disputed issues of material fact as to the state of the Defendants Officers' knowledge at the time they arrived on scene at Hopkins' home. This precludes the Court from resolving the issue of whether they are entitled to qualified immunity on the basis that the warrantless entry was justified by the existence of probable cause and exigent circumstances. The Court also concludes that even if it were to accept all of the facts as true, there are insufficient facts on this record for the Court to conclude that the Defendant Officers are entitled to qualified immunity on the basis of the

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3. In Cervantes, the Ninth Circuit set forth a three part test to determine whether the emergency exception applied. The second prong of that test required a court to examine the subjective intent of the officer who effected the warrantless entry. *Cervantes*, 219 F.3d at 888, 890. Well after Hopkins' arrest in this case, the United States Supreme Court in *Brigham City, Utah v. Stuart*, 126 S.Ct. 1943 (2006) effectively abrogated that portion of the *Cervantes* test and concluded that court's must focus on the objective circumstances known to the officers. *Brigham City*, 126 S.Ct. at 1948.

emergency exception to the warrant requirement. As such, the Defendants' motion is DENIED as to this claim.

2. No probable cause to arrest.

Hopkins also contends he was arrested without probable cause in violation of the Fourth Amendment. "A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification." *Dubner v. City and County of San Francisco*, 266 F.3d 959, 965 (9th Cir.2001) (citing *Larson v. Neimi*, 9 F.3d 1397, 1400 (9th Cir. 1993). "In evaluating a custodial arrest executed by state officials, federal courts must determine the reasonableness of the arrest in reference to state law governing the arrest." *United States v. Mota*, 982 F.2d 1384, 1388 (9th Cir. 1993). Under California law, probable cause to arrests exists when facts known to the arresting officer "would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." *People v. Adams*, 175 Cal. App. 3d 855, 861 (1985). The test under California law "is very similar to the Fourth Amendment test applied by [the Ninth Circuit], which provides that '[p]robable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime.' " *Peng v. Mei Chin Penghu*, 335 F.3d 970, 976 (9th Cir. 2003) (quoting *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999)).

Appendix B

As the Court has noted above, there are disputed issues of material fact as to the state of the Defendants Officers' knowledge at the time they arrived on scene at Hopkins' home. Again, this precludes the Court from resolving the issue of whether they are entitled to entitled to qualified immunity on the basis that the warrantless entry was justified by the existence of probable cause. Because any other evidence supporting a probable cause determination was obtained only after what might possibly have been an illegal entry into Hopkins' home, the Court cannot determine at this time that the Defendant Officers are entitled to qualified immunity on Hopkins' Section 1983 claim for unlawful arrest, and the Defendants' motion is DENIED on this basis.

D. The Motion for Summary Judgment on the Excessive Force Claim is Denied as to Officers Buelow and Bonvicino.

Hopkins' final claim against the Defendant Officers is that they used excessive force when they arrested him. However, Hopkins concedes that Officer Nguyen is not liable on this claim. Accordingly, the motion is GRANTED solely as to Officer Nguyen on the excessive force claim.

With respect to Officers Buelow and Bonvicino, it is clearly established that the use of excessive force by police officers in an arrest violates the arrestee's Fourth Amendment right to be free from unreasonable seizure. *White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986).

Hopkins bases his excessive force claim on the assertion that both Officers Bonvicino and Buelow pointed their weapons at Hopkins when they entered his room. (Master Decl., Ex. A at 70:3-16, 93:23-94:1, 103:15-19.) The Ninth Circuit has held that a claim for excessive force based on the fact that a weapon was pointed at a suspect in the context of a seizure can give rise to a claim for excessive force.[4] *See, e.g., Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir.2002). Whether an officer's conduct was reasonable is an objective one, however, asking "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (1989). The Court must consider whether the totality of the circumstances justifies the force used, examining particularly severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Id.* at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). "The 'reasonableness' of the particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citing *Terry v. Ohio*, 392 U.S. at 20-22).

As noted, Hopkins contends that both Officers Bonvicino and Buelow were pointing their weapons at

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4. The Defendant Officers have not suggested that Hopkins was not "seized" at the time.

him. (Master Decl., Ex. A at 70:3-16, 93:23-94:1, 103:15-19.) Officer Bonvicino testified that he did not have his weapon pointed at Hopkins but instead had it in the "low ready" position. Officer Bonvicino also testified that he did not point his weapon at Hopkins because he did not perceive a lethal danger from him and that it would not have been appropriate for him to have pointed a weapon at him. Officer Bonvicino also testified he did not know whether Officer Buelow pointed his weapon at Hopkins. (Bonvicino Depo. at 128:17-23, 143:2-144:14). The Court finds that there are disputed issues of fact as to whether Officer Bonvicino engaged in conduct that could support an excessive force claim, such that the Court cannot conclude that he is entitled to qualified immunity at this time.

In contrast, Officer Buelow acknowledges that he pointed his weapon at Hopkins. (Buelow Depo. at 78:16-19.) At that time, Hopkins was suspected of either leaving the scene of an accident, driving while intoxicated, or being in a diabetic coma. Although the Defendant Officers entered into the home without knowing if anyone else was present, they also testified that they received no response to their inquiries, and did not suggest that they heard any movement that could have suggested someone was present. When they encountered Hopkins, the facts suggested he was cooperative and did not attempt to flee from them or resist arrest. Viewing these facts in the light most favorable to Hopkins, the Court concludes that in opposing Defendants' motion, he has sufficiently alleged a violation of his right to be free from excessive force.

The Court also concludes that given the holding in *Solano*, the law was clearly established at the time of Hopkins' arrest. Thus, based on the current state of the record, the Court cannot conclude at this time that, as a matter of law, Officer Buelow is entitled to qualified immunity.

For the above stated reasons, the motion is DENIED on the excessive force claim as to Officers Buelow and Bonvicino.

E. The City's Motion for Summary Judgment Must Be Denied.

Hopkins contends that the City is liable under Section 1983 pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Municipalities are only liable for injuries that arise from an official policy or custom. *Id.* at 694. As the party with the burden of proof on this claim, Hopkins must show "(1) that he possessed a constitutional right of which he was deprived; (2) that the [City] had a policy; (3) that the policy 'amounts to deliberate indifference' to [Hopkin's] constitutional right; and (4) that the policy is the 'moving force behind the constitutional violation.' " *Anderson v. Warner*, 451 F.3d 1063, 1070 (9th Cir. 2006) (quoting *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (in turn quoting *City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989)). "There also must be a 'direct causal link' between the policy or custom and the injury," and Hopkins "must be able to demonstrate that the injury resulted from a 'permanent and well settled practice.' "

(*Id.* (quoting *McDade v. West*, 223 F.3d 1135, 1141 (9th Cir. 2000) (internal quotations omitted)). A municipality may not be held liable under Section 1983 where no injury or constitutional violation has occurred. *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir. 2001). The failure to train or supervise may give rise to a "policy or custom" sufficient to impose liability on the City. *City of Canton*, 489 U.S. at 389-90.

Because Hopkins' *Monell* claim is based in part on his allegations relating to the warrantless entry into his home, and because the Court cannot determine on the facts presented whether Hopkins was deprived of a constitutional right, the City's motion is DENIED on this aspect of Hopkins' section 1983 claim.

However, Hopkins also premises his *Monell* claim on his theory that the City failed to supervise Officer Buelow with respect to preparing reports on pointing firearms at suspects, and that Officer Buelow, in turn, trained his recruits to not follow the proper procedures. In opposing the City's motion, Hopkins submits a document entitled "Use of Deadly Force-Firearms, General Order 2.03," which provides:

> Sidearms shall remain holstered at all times. The drawing of any firearm shall take place only when an officer perceives a dangerous situation to exist, where self-protection or the protection of others is necessary. If an officer points his/her weapon at a person for the purpose of restricting that person's

> movements and no crime report is written, then the officer shall complete a memorandum, outlining the drawing and pointing of their weapon and forward it to the appropriate Division Commander, via their immediate supervisor. The officer shall complete and forward the memo prior to the end of their duty day.

(Boskovich Decl., Ex. F.) Officer Buelow admits that he did not prepare a report in accordance with this policy. Rather, he denies that this was a violation the policy and testified that it was a "common practice" for the officer preparing a report to include that information, and that he assumed that Officers Bonvicino or Nguyen would have included the information in their reports. (Buelow Depo., 76:9-80:24.)

The Court concludes that Hopkins has put forth sufficient evidence regarding his theory that the alleged failure to supervise Officer Buelow led to the alleged deprivation of a constitutional right. Accordingly, the City's motion on this aspect of Hopkins' section 1983 claim must also be DENIED.

IT IS SO ORDERED.

Dated: December 21, 2006

s/ Jeffrey S. White
JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 14, 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15102

D.C. No. CV-05-02932-JSW
Northern District of California,
San Francisco

BRUCE HOPKINS,

Plaintiff - Appellee,

v.

A. BONVICINO, Badge No. 1140, individually & in his official capacity as a San Carlos Police Officer; BUELOW individually & in his official capacity as a San Carlos Police Officer; NICK NGUYEN, Badge No. 1141, individually in his official capacity as a San Carlos Police Officer; CITY OF SAN CARLOS,

Defendants - Appellants.

Appendix C

ORDER

Before: SCHROEDER, D.W. NELSON and REINHARDT, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Schroeder and Reinhardt have voted to deny the petition for rehearing en banc, and Judge Nelson has so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied.

APPENDIX D — ADDITIONAL STATUTORY PROVISIONS

California Vehicle Code Section 23152—Driving under influence; Drivers of commercial vehicles

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.

Appendix D

(d) It is unlawful for any person who has 0.04 percent or more, by weight, of alcohol in his or her blood to drive a commercial motor vehicle, as defined in Section 15210.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(e) This section shall become operative on January 1, 1992, and shall remain operative until the director determines that federal regulations adopted pursuant to the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. Sec. 2701 et seq.) contained in Section 383.51 or 391.15 of Title 49 of the Code of Federal Regulations do not require the state to prohibit operation of commercial vehicles when the operator has a concentration of alcohol in his or her blood of 0.04 percent by weight or more.

(f) The director shall submit a notice of the determination under subdivision (e) to the Secretary of State, and this section shall be repealed upon the receipt of that notice by the Secretary of State.

Appendix D

California Vehicle Code Section 23536—First Offense

(a) If a person is convicted of a first violation of Section 23152, that person shall be punished by imprisonment in the county jail for not less than 96 hours, at least 48 hours of which shall be continuous, nor more than six months, and by a fine of not less than three hundred ninety dollars ($390), nor more than one thousand dollars ($1,000).

(b) The court shall order that a person punished under subdivision (a), who is to be punished by imprisonment in the county jail, be imprisoned on days other than days of regular employment of the person, as determined by the court. If the court determines that 48 hours of continuous imprisonment would interfere with the person's work schedule, the court shall allow the person to serve the imprisonment whenever the person is normally scheduled for time off from work. The court may make this determination based upon a representation from the defendant's attorney or upon an affidavit or testimony from the defendant.

(c) The person's privilege to operate a motor vehicle shall be suspended by the department under paragraph (1) of subdivision (a) of Section 13352 or Section 13352.1. The court shall require the person to surrender the driver's license to the court in accordance with Section 13550.

Appendix D

(d) Whenever, when considering the circumstances taken as a whole, the court determines that the person punished under this section would present a traffic safety or public safety risk if authorized to operate a motor vehicle during the period of suspension imposed under paragraph (1) of subdivision (a) of Section 13352 or Section 13352.1, the court may disallow the issuance of a restricted driver's license required under Section 13352.4.

California Vehicle Code Section 40300.5—Arrest without warrant

In addition to the authority to make an arrest without a warrant pursuant to paragraph (1) of subdivision (a) of Section 836 of the Penal Code, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug when any of the following exists:

(a) The person is involved in a traffic accident.

(b) The person is observed in or about a vehicle that is obstructing a roadway.

(c) The person will not be apprehended unless immediately arrested.

(d) The person may cause injury to himself or herself or damage property unless immediately arrested.

(e) The person may destroy or conceal evidence of the crime unless immediately arrested.

California Vehicle Code Section 20002—Duty where property damaged

(a) The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, shall immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists. Moving the vehicle in accordance with this subdivision does not affect the question of fault. The driver shall also immediately do either of the following:

(1) Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, upon locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, upon being requested, present his or her driver's license, and vehicle registration, to the other driver, property owner, or person in charge of that property. The information presented shall include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he or she shall also, upon request, present his or her driver's license information, if available, or other valid identification to the other involved parties.

(2) Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and of the owner of the vehicle involved and a statement of the circumstances thereof and shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

(b) Any person who parks a vehicle which, prior to the vehicle again being driven, becomes a runaway vehicle and is involved in an accident resulting in damage to any property, attended or unattended, shall comply with the requirements of this section relating to notification and reporting and shall, upon conviction thereof, be liable to the penalties of this section for failure to comply with the requirements.

(c) Any person failing to comply with all the requirements of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars ($1,000), or by both that imprisonment and fine.

(2)

No. 09-681

FILED

In The

Supreme Court of the United States

ARMAND BONVICINO and DAVID BUELOW,

Petitioners,

v.

BRUCE HOPKINS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is driving under the influence of alcohol properly deemed to be such a "minor" offense that entry into a residence under the exigency exception to preserve evidence of that offense can never be justified – even though the offense carries a penalty of up to six months in jail and the commission of the offense results in thousands of deaths every year?

2. If a citizen eyewitness makes a report to the police that, on its face, provides a fair probability that a person just committed a crime, are police required to conduct further investigation into that crime before they may enter a suspect's residence to prevent the imminent destruction of evidence of that crime?

3. In assessing the constitutionality of a warrantless entry into a residence by police to check on the condition of a person inside the residence, is a court prevented from placing any weight on the fact that the person inside has failed to answer the door because "nothing requires an individual to answer the door in response to a police officer's knocking"?

4. Does the pointing of a gun at an individual inside an unfamiliar residence prior to the apprehension of that individual for the commission of a crime constitute excessive force?

LIST OF PARTIES

Bruce Hopkins

Armand Bonvicino

David Buelow

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Bruce Hopkins respectfully requests that this Court decline to review the judgment and opinion of the United States Court of Appeals, in and for the Ninth Circuit, entered on 16 July 2009, in the above-entitled proceeding.

OPINIONS BELOW

Hopkins v. Bonvicino, et al., 573 F.3d 752 (9th Cir. 2009), reprinted in Petitioner's Appendix A.

Hopkins v. Bonvicino, et al., Unpublished Order (N.D. Cal. 2006), reprinted in Petitioner's Appendix B.

INTRODUCTION

"This is an odd flyspeck of a case." (*Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006) (*conc. opn. of* Stevens, J.) Petitioners come to this Court and ask it to take time from its busy docket to determine a very extreme and fact-specific situation. In a nutshell, Petitioners claim that California and even national law enforcement has become paralyzed because they can no longer make a warrantless entry into a home when a citizen makes a bald and totally – and in this case *totally* literally means *totally* – unsubstantiated claim of a hit and run accident with an inebriated driver. In the approximately ten minutes that Petitioners were present, they were told by a person

with a known motive to lie that there had been a minor "tap" at an intersection, but there was no physical evidence to corroborate that claim, and in fact there was no evidence nor the slightest investigation that any vehicle had even been driven much less involved in an accident. They were told that a phantom driver had smelled of alcohol, and staggered into a home, but there was no evidence that this driver even existed, much less had driven and was inside. From this, Petitioners opined in under ten minutes that there was a serious threat of a diabetic coma and broke into Respondent's home with guns drawn, allegedly in order to save him. Of course, arrest as opposed to rescue ensued. In Petitioners' view, these "facts", in reality a mere chimera, established ample probable cause and exigency rendering their actions *per se* reasonable, at a minimum entitling them to qualified immunity because three years later the California Supreme Court made a ruling that on its best day is distinguishable on its facts. Should this Court agree with Petitioners and grant the Writ, we might as well take an indelible marker and redact the Fourth Amendment from the United States Constitution because it will have no real practical effect, and Justice Scalia's promise that 42 U.S.C. § 1983 will protect us from police abuse, as outlined in *Hudson v. Michigan*, 547 U.S. 586, 596-99 (2006), will go unfulfilled via the immunity sought in this case.

The Petition must be denied.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals in and for the Ninth Circuit was entered on 16 July 2009, with a petition for rehearing being denied on 14 September 2009. Since the appeal in this case is from a denial of qualified immunity, the order is immediately appealable. (*Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985)) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondent Bruce Hopkins brought suit against Petitioners, as well as Officer Nick Nguyen and the City of San Carlos, California, on 19 July 2005 for violation of his civil rights arising out of the warrantless entry into his home with guns drawn by San Carlos police officers, with neither probable cause nor any exigency. He also made a claim against the City pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which was neither the subject of the appeal nor this Petition.

Petitioners filed a motion for summary judgment on the grounds that they are entitled to qualified immunity because, in their view, there was probable cause to enter Mr. Hopkins' home to arrest him for driving under the influence and "hit and run". They further argued that they were entitled to enter under the "emergency aid" exception. They finally argued

that pointing their guns at Mr. Hopkins did not constitute excessive force.

The trial court disagreed, finding that there were "disputed issues of material fact as to the state of Defendant Officers' knowledge at the time they arrived on scene . . . " and that "even if it were to accept all of the facts as true, there are insufficient facts on this record for the Court to conclude that the Defendant Officers are entitled to qualified immunity on the basis of the emergency exception to the warrant requirement." (Exhibit B to Petition, pp. 51a-52a) The court further found disputed issues of material fact regarding what the officers knew at the time of entry into the home with respect to the existence of probable cause to arrest Mr. Hopkins. (*Id.* at p. 53a) The court finally found disputed issues of material fact regarding the use of excessive force and that the law was clearly established at the time of the incident. (*Id.* at 53a-56a)

Petitioners appealed, now arguing in principal part, as they essentially do here, that the California Supreme Court's subsequent decision in *People v. Thompson*, 38 Cal.4th 811 [135 P.3d 3] (Cal. 2006), somehow unsettled the state of the law *post factum*, entitling the Petitioners to qualified immunity, and that this Court had created a rigid standard that any jailable offense abrogates the Fourth Amendment reasonableness requirement should the potential for destruction of evidence exist. In its unanimous opinion, the Ninth Circuit rejected that argument, instead reaffirming this Court's repeated teaching

that a warrantless entry into a person's home must be objectively reasonable under the circumstances. (See, e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)) The Ninth Circuit reversed as to Officer Nguyen, however, and dismissed him from the case.

This petition followed.

II. STATEMENT OF FACTS[1]

On 22 August 2003, at approximately 6:24 P.M., the San Carlos police received a call from Waheeda Talib, who claimed that she had been involved in an accident and that she had followed the driver of the other vehicle, later identified as Bruce Hopkins, to a residence. This was Bruce Hopkins' home. The dispatcher reported that Mr. Hopkins went into the house after a minor "415"[2], and appeared to have been drinking. Petitioner Armand Bonvicino and Officer Nick Nguyen drove the short distance from the police station in a normal manner and arrived 2 to 4 minutes later, and spoke with Ms. Talib. Ms. Talib stated that she and Mr. Hopkins were stopped at a red light, and that Mr. Hopkins moved forward

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[1] As opposed to the norm, a detailed version of the facts is presented because, in Respondent's view, given that the clear standard is one of reasonableness, and because this case comes to this Court early on from an interlocutory appeal from a denial of qualified immunity, it is critical that the Court understand the totality of the facts to assist it in application of the standard.

[2] This refers to California Penal Code § 415, commonly known as "disturbing the peace".

and hit the vehicle in front of him, and then backed his vehicle into Ms. Talib's vehicle, and that they then both got out of their vehicles. *Ms. Talib told the officers that there was no visible damage to her car, and that Mr. Hopkins had said the same thing at the scene of the accident.* She further stated that she and Mr. Hopkins argued, that Mr. Hopkins refused to admit his involvement in the accident, and drove away. Ms. Talib told the officers that she followed Mr. Hopkins to the home, that she had a confrontation with Mr. Hopkins there, and that he ran inside his house and did not come out despite her persistent knocking. Ms. Talib did not volunteer and the officers did not ask whether Mr. Hopkins' driving appeared impaired in any way on the drive home. Ms. Talib further stated that she smelled a strong odor of alcohol on Mr. Hopkins, and he appeared drunk. When asked if she needed medical attention, Ms. Talib said no, and she did not appear to be in need of any. Ms. Talib was angry and agitated, was raising her voice, and had a motive to lie because she claimed to have been in an accident in a rental car. She expressed no opinion or concern for Mr. Hopkins' health or well-being. Officer Bonvicino made no further inquiry into Ms. Talib's observations regarding Mr. Hopkins' medical status, her medical training, whether Mr. Hopkins was wearing a bracelet indicating that he was a diabetic, or whether the odor she smelled was of alcohol or the "sickeningly sweet" odor he had been trained would indicate a diabetic emergency. In fact, Officer Bonvicino did not believe that she had given him information that would lead

him to be concerned for Mr. Hopkins' medical condition at all. Officer Bonvicino made no inquiry into the mechanics of the accident, did not inspect the vehicles, and did not know if either vehicle was damaged in any way. In fact, there was no damage to either vehicle.[3]

Officer Bonvicino proceeded to go to the front door of the residence, and knocked on the door four times, announcing his presence. Each series of knocks was progressively louder. Officer Nguyen was standing by with Ms. Talib approximately 20 feet away from Officer Bonvicino. Getting no response, Officer Bonvicino left the front door[4] and proceeded to have a conversation with Officer Nguyen and Officer Buelow, who had arrived on scene. It was decided in that conversation that Officers Bonvicino and Buelow would attempt to make contact with Mr. Hopkins and that Officer Nguyen would investigate the accident. *Officer Bonvicino did not believe that based upon the*

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[3] Although Officer Nguyen stated in his report that there was damage to the vehicles, he could not identify the damage in his deposition from the photographs he took that day. The contemporaneous digital photographs, supplied to the trial court as well as the Court of Appeals on CD, speak for themselves, showing absolutely no damage, and thereby create a triable issue of fact.

[4] Mr. Hopkins testified that the officers must have attempted to kick the front door open because it was damaged, as well as a written complaint that the officers had attempted to enter through a screened window.

information that he had that there was probable cause to arrest Mr. Hopkins for anything.

Officers Bonvicino and Buelow proceeded to the right side of the house, and proceeded through a gate[5] into a side yard. Officer Bonvicino proceeded to announce his presence again at an open door that was secured by a locked screen door. With no response, Officers Buelow and Bonvicino had a discussion and Officer Bonvicino decided to force entry into the residence, purportedly to make a welfare check on Mr. Hopkins. The total elapsed time from the initial call to the police until the decision to force entry was no more than 11 minutes and 2 seconds. As a result, Officer Bonvicino cut the screen door and opened it, and the two officers went into the house with guns drawn. Officer Bonvicino proceeded with his gun pointed at the floor; Officer Buelow had his gun pointed directly in front of him.

The officers eventually made their way into Mr. Hopkins' room and Officer Bonvicino immediately smelled alcohol. Mr. Hopkins testified that the television was on as well as a lamp. The officers testify it was dark. Officer Bonvicino saw a pair of feet[6], and ordered Mr. Hopkins, who was lying on his back, to show his hands and approach him. Mr.

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[5] Officer Buelow testified that he had been trained that he was only allowed to go onto a person's property "to the gate."

[6] Officer Buelow saw something different. He saw Mr. Hopkins under a blanket in the fetal position.

Hopkins complied. Not fearing for his safety, Officer Bonvicino holstered his gun and approached the compliant Mr. Hopkins to handcuff him. Despite the fact that there was no reason to point his gun at Mr. Hopkins (Officer Bonvicino testified that pointing a gun at Mr. Hopkins would have been "inappropriate"), Officer Buelow continued to point his gun at Mr. Hopkins until Mr. Hopkins was handcuffed. Additionally, and against the clear written policy of the City of San Carlos, Officer Buelow, who was both Officer Bonvicino's and Officer Nguyen's field training officer for a time, expected Officer Bonvicino to document the use of *Officer Buelow's* weapon despite the fact that Officer Bonvicino had no knowledge that Officer Buelow had pointed his gun at Mr. Hopkins. Officer Buelow stated that he trained his recruits that this violation of written policy was acceptable, and that this was a common custom and practice in the San Carlos police department, and that he "never got in trouble for it."

Mr. Hopkins was taken outside and identified by Ms. Talib, and, after being asked by Officer Nguyen if she would like to make a citizen's arrest, she did so. Mr. Hopkins was taken into custody, and eventually arrested for driving under the influence of alcohol and leaving the scene of an accident causing property damage only.

Petitioners had been trained by the City of San Carlos in several relevant areas. They were trained that alcohol intoxication could resemble a diabetic coma, and that the distinction between the two was

that the odor of the breath was different; but, they received no training on the distinction other than the fact that the odor in a diabetic case is "fruity" or "sickeningly sweet". They were further trained that it required further investigation to make the distinction, such as the existence of medical bracelets, listlessness to agitation, confusion, and the like. There was no training on the length of time that an ambulatory person with the "fruity odor" would become emergent or unconscious.

REASONS WHY THE WRIT MUST BE DENIED

I. PETITIONERS HAVE GROSSLY MISCHARACTERIZED THE COURT OF APPEALS' OPINION WHICH SIMPLY APPLIED THIS COURT'S TEST OF REASONABLENESS TO THE FACTS IN THE CONTEXT OF A WARRANTLESS ENTRY INTO A HOME.

A comparison of the Petition with the Opinion leaves the reader scratching his or her head because they seem to bear little or no resemblance to one another. Petitioners seem to be arguing that the Ninth Circuit has overruled the California Supreme Court's opinion in *People v. Thompson*, 38 Cal.4th 811 [135 P.3d 3] (Cal. 2006) on the grounds that *Welsh v. Wisconsin*, 466 U.S. 740 (1984), requires a jailable offense in order to dispense with a warrant. In fact, as this Court has repeatedly made clear, the true test is the *gravity* of the offense at issue as opposed to the penalty, (See, e.g., *United States v. Banks*, 540 U.S.

31, 38, fn. 4 (2006) ["In a different context governed by the Fourth Amendment, we have held that the risk of losing evidence of a minor offense is insufficient to enter a dwelling to make a warrantless arrest. (Citation)"; *Brigham City, Utah*, *supra*, 547 U.S. at 405 ["*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level) – an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. (Citation)"]), and that is exactly the standard the Court of Appeals applied here. (Ex. A to Petition, p. 23a ["To the contrary, in *Welsh, supra,* the Supreme Court held that the exigency analysis must turn on the '*gravity* of the underlying offense,' 466 U.S. at 753 (emphasis added), not its status as 'jailable' or 'non-jailable.'"[7] This Court has supplied a workable standard that has been applied here to an outrageous set of facts.

But most importantly, *this* Petition should be denied on *these* facts because they are simply so

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[7] It is of course acknowledged that this Court concluded that the possibility of jail is an important factor in the calculus. (*Illinois v. McArthur*, 531 U.S. 326, 336 (2001) But this Court went on to make clear in that case that what was at stake was not intrusion into the home but instead "[t]emporarily keeping a person from entering his home. A consequence whenever police stop a person on the street .. [and] .. considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search. (Citation)" (*Ibid.*)

egregious and the conduct of Petitioners was so unreasonable that *any* action by the officers other than further investigation with the reporting party was virtually *per se* unreasonable, and reasonableness is the lynchpin of the Fourth Amendment. As this Court has made clear, and as shown below, if the conduct of the officers was unreasonable, the analysis is at an end.

The Fourth Amendment itself protects against "*unreasonable* searches and seizures . . . " This Court has repeatedly emphasized the requirement of reasonableness.

> "[T]he ultimate touchstone of the Fourth Amendment," we have often said, "is 'reasonableness.'" (Citation) Therefore, although "searches and seizures inside a home without a warrant are presumptively unreasonable", (*Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (internal quotation marks omitted)), that presumption can be overcome. For example, "the exigencies of the situation [may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." (*Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978))

(*Fisher v. Michigan*, ___ U.S. ___, ___ [130 S.Ct. 546, 547] (2009); accord, *Brigham City, Utah*, *supra*, at 402 and cases cited therein.)

The conduct of the Petitioners in this case was anything but reasonable.

Here, Petitioners arrived on-scene and spoke for barely one or two minutes to a person who said she had been involved in a hit and run accident with a drunk driver. But there was *no evidence* that there had been an accident, *no evidence* of any injury or property damage, and *no evidence* that there had even been any driving by anybody. For all the officers knew, the reporting party was a stalker wanting to harass the occupants of a home. Rather than conduct any inquiry, Petitioners knocked on the door of the home and received no response. Rather than ask a single further question regarding this report of an at best low level misdemeanor, Petitioners proceeded to break into Mr. Hopkins' home with guns drawn because they believed he might be suffering from a medical emergency. Should this conduct pass any test of reasonableness, the Fourth Amendment is in reality nothing more than a nullity and the smell of alcohol as reported by a stranger will have legally metamorphosed into the keys to the castle.[8]

Even should this Court be tempted to modify its prior holdings regarding dissipation and/or destruction of evidence as sufficient exigency in a misdemeanor driving under the influence situation, it should resist that urge here because of the facts in *this case*. What differentiates the facts here from the facts of this Court's, as well as other Courts', previous

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[8] "A man's home is his castle." (*Miller v. United States*, 357 U.S. 301, 307 (1958))

rulings, is that Petitioners in this case had not one independent fact from which to make a determination as to whether probable cause existed to arrest Mr. Hopkins, or whether there was any exigency at all.[9]

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[9] For probable cause to exist, the "facts and circumstances within the officer's knowledge (at the time of an arrest)" must be sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." (*Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) Probable cause has been described as a "fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." (*Illinois v. Gates*, 462 U.S. 213, 232 (1983)) A court reviews the events leading up to the arrest and determines if probable cause exists from the standpoint of an objectively reasonable officer. (*Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003)) Additionally, should information come from an informant, the information must come from a citizen who is "unquestionably honest" in order to negate the requirement of some further investigation. (*Illinois v. Gates*, *supra*, at 233-234) Finally, " . . . no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'" (*Horton v. California*, 496 U.S. 128, 137, fn. 7 (1990))

This Court has also cautioned that "exceptions to the warrant requirement are 'few in number and carefully delineated'" (*Welsh v. Wisconsin*, 466 U.S. 740, 749 (1984)) An accepted exception to the warrant requirement is if there is a recognized exigency, such as emergency aid. As a result, " . . . law enforcement officers may enter a home to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. (Citations)" (*Brigham City, Utah*, *supra*, at 403) This Court has repeatedly reaffirmed its position in *Welsh*, *supra*, at 754, that a warrantless intrusion into the home for preservation of evidence in a very minor crime violates the Fourth Amendment. (See, e.g., *Banks*, *supra*, at 38, fn. 4 ["In a

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First, Petitioners' argument that a victim's report of a crime is presumptively true and thereby creates probable cause is simply incorrect under the facts of this case. Unlike the common case where it is reasonably certain that a crime has been committed, that is not what happened here; far from it. Nothing at the scene would have led any reasonable officer to conclude that *any* crime had occurred other than an unknown person making a report in front of an apparently empty house. That is insufficient to establish probable cause. (See, e.g., 2 LaFave, *Search & Seizure* (4th Ed. 2004), § 3.4(b), fn. 123 and cases cited therein, p. 248) Here, as argued above, there were no indicia that a crime had occurred sufficient to warrant breaking into a home.

Courts, including this one, have made it clear that dispensing with the necessity of a warrant before breaking into a home usually requires some independent knowledge. A review of the facts of a few cases is instructive. In *Brigham City, Utah*, *supra*, at 401, the officers saw juveniles and adults drinking

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different context governed by the Fourth Amendment, we have held that the risk of losing evidence of a minor offense is insufficient to enter a dwelling to make a warrantless arrest. (Citation)"]; *Brigham City, Utah*, *supra*, at 405 ["*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (i.e., the suspect's blood-alcohol level) – an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. (Citation)"])

and fighting, leading to observed bloodletting. Based upon their observations, it was deemed objectively reasonable that the officers enter. (*Id.* at 406)

In *Thompson*, *supra*, at 815-16, the citizen informant found the defendant passed out in a vehicle. A neighbor woke him up, and asked him to leave. Before he left, the defendant stumbled about and threw away an empty vodka bottle. The defendant passed out again, and the informant knew he was intoxicated; she had seen him this way several times before. She followed the defendant and called "911". She saw him run a red light, drive above the speed limit, and weave in traffic, coming very close to a concrete barrier. He ran through several stop signs and drove too fast in a neighborhood with children present. The police arrived, got the license number, and drove to the owner's home, where the officer found the vehicle. The hood was still warm. The officers approached the home and rang the doorbell. The person who answered the door, when asked by the police who had been driving, responded that the defendant owned the vehicle. She said the defendant was asleep, and, when asked if he could be awakened, she went back to a room next to the front door, stayed there awhile, and said the defendant could not be awakened. She refused entry to the officers, but also left the door wide open.

The officers heard talking down the hall, and then saw a shirtless man who matched the description of the driver leave the house and go into the backyard. When the man made eye contact with the

officer, he was motioned to the front door, and he came. The officers saw that the man was staggering and slurred his speech, and smelled strongly of alcohol. When the officer explained his presence and purpose, the defendant refused to cooperate. As he walked away, the officer entered the home through the open door and grabbed him.

In contrast to this case, the defendant in *Thompson, supra*, had been seen driving dangerously, and he had been seen passed out and with a liquor bottle. The officers saw the defendant themselves and were able to corroborate his state of sobriety and, by feeling the hood, were able to determine that the vehicle had been driven very recently. The defendant's expectation of privacy was also diminished because he voluntarily spoke with the officers and the front door was always open. The intrusion was minimal since the officer only went a few feet over the threshold. The court found the intrusion especially minimal because the police never went anywhere that was not already exposed to public view and did need to make a forced entry. (*Id.* at 828)

The factual distinctions from this case are not without import. In this case, the officers made no independent observations and, as shown above, in reality they had no information upon which an objectively reasonable police officer could rely before taking the monumental step of making a warrantless intrusion into a home. And, contrary to the pleading of Petitioners, this Court has outlined a clear and workable standard under the Fourth Amendment,

namely objective reasonableness. This Court cannot and should not be expected to weigh in on the virtually infinite number of factual scenarios that police officers face in the performance of their duties, and certainly not in a situation such as this one where the officers can only be kindly said to have gotten "creative" in their duties.

The Petition must be denied.

II. THE PETITION MUST BE DENIED WITH RESPECT TO THE EXCESSIVE FORCE CLAIM BECAUSE AT A MINIMUM IT IS PREMATURE

Petitioners finally argue that Officer Buelow is entitled to qualified immunity for pointing his gun at Mr. Hopkins after Officer Bonvicino determined that there was no reason to do so and that it would have been inappropriate to have pointed a gun at him. Their argument is, among others, that since Officer Bonvicino did not testify that it was inappropriate for *Officer Buelow* to have pointed his weapon at Mr. Hopkins that this evidence is somehow irrelevant. But the reality is that this testimony created a triable issue of fact, thereby precluding a finding of qualified immunity at the procedural stage of the case, namely summary judgment.

Petitioners also make the legal gaffe of citing cases such as *Wilkins v. May*, 872 F.2d 190 (7th Cir. 1989) which predate and have been superseded by *Graham v. Connor*, 490 U.S. 386, 394-95 (1989). The

citation to *Los Angeles County, California v. Rettele*, 550 U.S. 609 (2007), is curious, because in that case this Court reaffirmed the basic Fourth Amendment standard, discussed above, of *reasonableness*. (*Id.* at 614) This Court went on to explain that "[t]he Constitution does not require an officer to ignore the possibility that an armed suspect may sleep with a weapon within reach." (*Ibid.*) But here, as pointed out above, Officer Bonvicino determined that it was "inappropriate" to point a gun at Mr. Hopkins, and, at trial, a factfinder might well find it unreasonable for Officer Buelow to continue to point his gun at Mr. Hopkins after it was determined that Mr. Hopkins posed no threat of any kind. Certainly a court, based upon a cold record, cannot make that determination, especially when a trained professional on scene at the time had the courage to testify that what a colleague did was essentially wrong. The Court of Appeals relied on its 2002 decision of *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir. 2002), which has been cited in excess of 250 times and criticized but once, in which it was held that "pointing a gun to the head of an apparently unarmed suspect during an investigation *can* be a violation of the Fourth Amendment, especially where the individual poses no danger" (emphasis added), yet Petitioners exhume authority from the 1980's in order to make a claim of qualified immunity. The Court of Appeals made an accurate statement of the law, and it was clearly established, and Petitioners' attempts to resurrect the ghosts of the past do not create a conflict leading to qualified immunity. Therefore, at this stage of the

litigation, review by this Court would be inappropriate.

The Petition must be denied.

CONCLUSION

Bruce Hopkins respectfully requests that for the reasons stated above that this Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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